

87-675

U.S. Supreme Court, U.S.  
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JOSEPH F. SPANIOLO, JR.

IN THE UNITED STATES SUPREME COURT

OCTOBER 1987 TERM

THOMAS LEROY JOHNSTON, )  
Petitioner, )  
v. ) No. \_\_\_\_\_  
JOHN MAKOWSKI, Warden )  
of Conners Correctional )  
Center, and MICHAEL C. )  
TURPEN, Attorney General )  
of the State of Oklahoma )  
Respondents. )

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI

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October, 1987



I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Writ of Certiorari should issue where the court below failed to issue a Writ of Habeas Corpus even though petitioner is being confined under a sentence imposed by an Oklahoma court in a case in which (i) a prejudicial police report, not admitted in evidence, was in the jury room throughout the deliberations, (ii) the two jurors who were questioned admitted the possibility that other jurors might have referred to the material, and (iii) the other jurors were not questioned to positively exclude such possibility where gross violations of fundamental rights are involved and where the decision is in conflict with a decision from another circuit?

2. Whether a Writ of Certiorari should issue where the court below

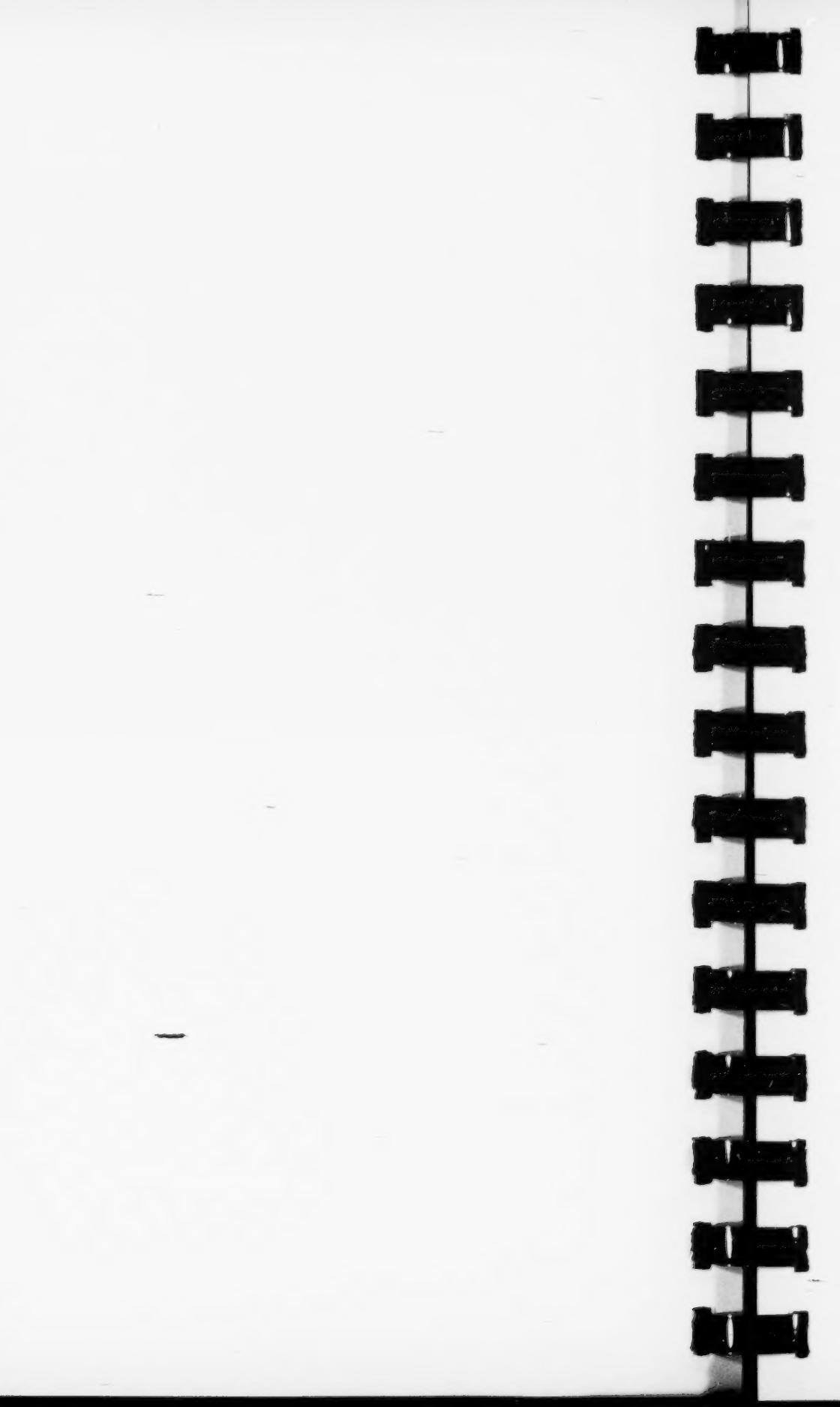


failed to issue a Writ of Habeas Corpus even though petitioner is being confined pursuant to a sentence imposed by an Oklahoma Court following a trial in which the alleged rape victim was permitted to make an in-court identification which had been tainted by a prior impermissibly suggestive photographic identification, in violation of petitioner's rights to due process and to a fair trial and contrary to decisions of this Court?

## II.

### LIST OF PARTIES TO THE PROCEEDING

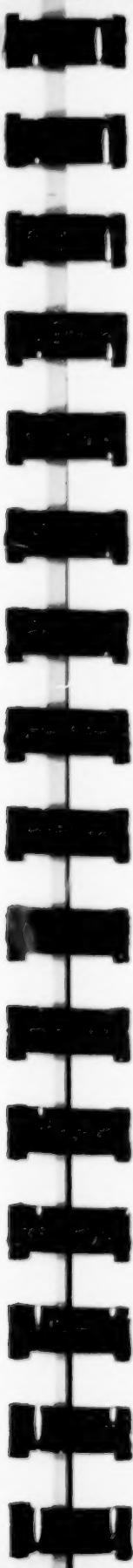
The caption of this case contains a list of all parties, except that the current Attorney General is Robert Henry and the warden with custody of Johnston is James Saffle.



III.

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<u>PETITION FOR CERTIORARI</u>	
For his petition to this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, petitioner Thomas Leroy Johnston ("Johnston") alleges and states as follows:	



V.

OFFICIAL AND UNOFFICIAL REPORTS  
OF OPINIONS DELIVERED IN THE  
COURTS BELOW

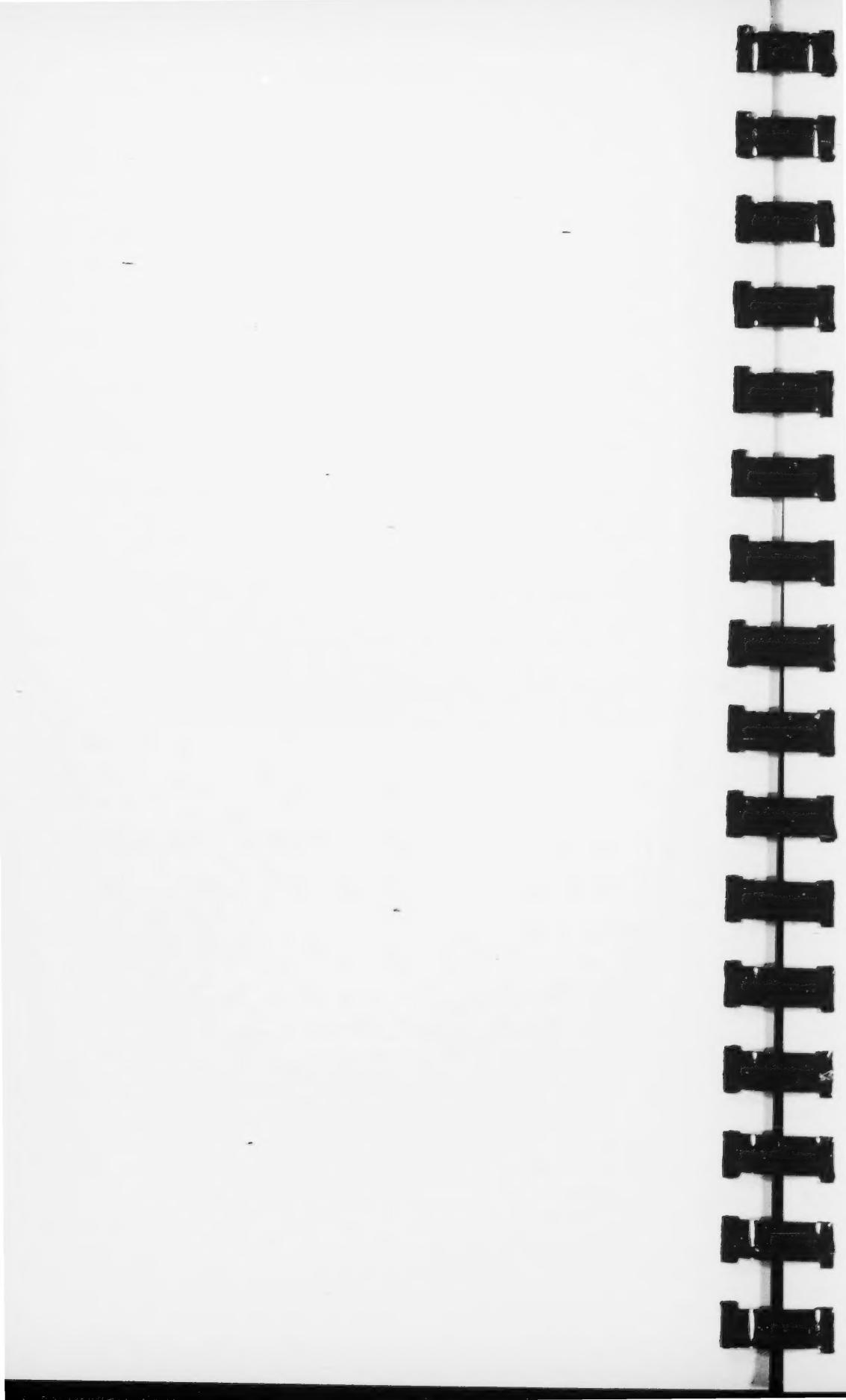
A. State trial court. No formal written opinion was entered. However, the court entered its oral findings and ruling during the course of a hearing conducted on March 24, 1982. The relevant excerpts of the hearing are found in the Transcripts of Motions, 3/24/82, at pages 90 and 91.<sup>1/</sup>

B. Oklahoma Court of Criminal Appeals. The opinion by the Oklahoma Court of Criminal Appeals was published at 673 P.2d 844 (OK. Cr. 1983).

C. Opinion by the United States District Court for the Western District

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<sup>1/</sup> All references herein to Transcript and to the Original Record includes materials in the record before the Tenth Circuit. The Clerk of that Court has been requested to forward such record to the Clerk of this Court.



of Oklahoma. A copy of the Opinion entered by the United States District Court for the Western District of Oklahoma ("the District Court"), upon the application of petitioner for issuance of a Writ of Habeas Corpus, is attached hereto as Appendix A.

D. United States Court of Appeals for the Tenth Circuit. The slip opinion by the United States Court of appeals for the Tenth Circuit ("Tenth Circuit") is attached hereto as Appendix B.

VI.

STATEMENT OF GROUNDS FOR JURISDICTION

A. Date of judgment sought to be reviewed. The decision by the Tenth Circuit was entered on July 7, 1987. No request for rehearing was filed.

B. Statutory Provision Conferring Jurisdiction. Title 28, United States Code, Section 1254.



VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

B. Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously



ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

C. Fourteenth Amendment to The United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. 28 U.S.C. § 2254(d). This Section states:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a



State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;



(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of that record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination had been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding,



considered as a whole, does not fairly support such factual determination the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

## VIII.

### STATEMENT OF THE CASE

#### A. Procedural Background.

On November 9, 1981, Johnston was charged in an information with the crimes of first degree rape, oral sodomy, and kidnapping for the purpose of extorting sexual gratification. O.R. 1.<sup>2/</sup> The alleged victim of the offenses was Theresa Robinson ("Robinson").

The jury returned verdicts of guilty and fixed punishment at 99 years

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<sup>2/</sup> O.R. refers to the Original Record on appeal before the Oklahoma Court of Criminal Appeals, which record formed a part of the record before the District Court and Tenth Circuit. The Clerk of the Tenth Circuit has been requested to forward the record to the Clerk of this Court.



imprisonment on each count. O.R. 101-106.

Johnston moved for a new trial and for a hearing concerning the jury's receipt of evidence not admitted (a police report concerning another alleged crime by Johnston) and newly discovered evidence. O.R. 107-113.

After conducting an evidentiary hearing, the trial court granted a new trial as to sentencing only. O.R. 214. Transcripts of motions, March 24-25, 1982.

The second jury returned a verdict fixing punishment on each count at imprisonment for 50 years. O.R. 184.

Thereafter, various motions were filed on behalf of Johnston, including a motion in arrest of judgment, a motion to reduce sentence to statutory minimum, and a motion for new trial. O.R. 185-188. The motions were overruled,

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and on September 28, 1982, the trial court formally sentenced Johnston to 50 years on each count, to run concurrently. O.R. 190.

Johnston thereafter perfected an appeal to the Oklahoma Court of Criminal Appeals. By opinion entered on December 22, 1983, the judgment of the Oklahoma trial court was affirmed. Johnston v. State of Oklahoma, 673 P.2d 844 (Ok. Cr. 1983). On February 23, 1984, a Petition for a Writ of Certiorari was filed in the United States Supreme Court. By Order entered on June 4, 1984, the Petition was denied.

On August 23, 1985, Johnston filed, in the District Court, his Petition for a "Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody" against the warden where he was incarcerated and against the Attorney General of the State of Oklahoma,



seeking entry of a Writ of Habeas Corpus for his release from imprisonment on the sentences entered by the District Court of Oklahoma County. The grounds for relief were the same as those being raised by this appeal.

On April 14, 1986, the District Court entered a judgment denying the petition for issuance of a Writ of Habeas Corpus, together with an opinion. See Appendix E hereto. On April 23, 1986, upon application of Johnston, the District Court entered an Order certifying probable cause for appeal to the Tenth Circuit.

Johnston continues to be incarcerated by the State of Oklahoma.

B. Factual Background.

1. Police Report Not Admitted In Evidence In Jury Room

The document upon which this portion of the petition for certiorari



is based was a Midwest City, Oklahoma, police department report relating to the alleged rape. The report was marked as Defendant's Exhibit 18 for identification, and portions of it were used in cross-examining detectives who investigated the alleged crime concerning matters relating directly to the alleged rape. Trial Tr. 230-31, 332, 346-47. The report was neither offered nor admitted in evidence. Trial Tr. 231. The report states that additional charges were being prepared against Johnston for attempted rape in another matter and it also contains prejudicial information concerning the charges upon which Johnston was being tried.

Specifically it states as follows:

". . . [I]t was brought to Det. Askew's attention by Det. K. Anderson, that she was preparing to file charges on the above suspect for attempted rape and that the suspect was in custody in the MWC jail at



that time. Det. Askew transported the victim to the Okla. County jail for a viewing . . . and also present during the lineup were legal counsel for the suspect . . . During the lineup each suspect was told to say two things . . . as a result of this lineup, the victim picked #3 in the lineup, Johnston, as the one who had forced himself into her vehicle, took her to a secluded area, raped and sodomized her.

... This case should be considered cleared, with charges to be sought at the Oklahoma County DA's office on 11-9-81 charging the suspect with the above 3 crimes, and an additional follow-up will be conducted in the Holiday Square Shopping Center for possible witnesses who may have observed the suspect there on the night of the crime." (Emphasis added.)

Midwest City Police Department Report,  
10/9/81, Defendant's Exhibit 18 for  
identification.

The matter of the additional charges and the prejudicial information were not referred to before the jury.

The trial court granted an evidentiary hearing on the motion, and, at the



evidentiary hearing, testimony was admitted from the court reporter, the bailiff, the foreman of the jury, and a jury member. See Transcript of Motions, March 24, 1982.

Anna Pipkin, who was the court reporter throughout the proceedings, testified that she did no work to separate exhibits admitted into evidence and those marked but not offered or admitted into evidence. Tr. 3-24-82, 5-7. The police report was not admitted in evidence, nor was it offered in evidence. Tr. 3-24-82, 9-14. At the conclusion of the trial, the court reporter gave the various exhibits to the bailiff. Tr. 3-24-82, 15-16.

The bailiff, who was in charge of the jury at the conclusion of the presentation of the evidence, took the exhibits to the jury deliberation room within five minutes after the jury had



been taken to the room. Tr. 3-24-82, 30. He had no discussion with the court reporter as to whether any of the exhibits in her area had been marked but not offered or admitted. Tr. 3-24-82, 30. He gathered all of the exhibits that he saw at the court reporter's location, Tr. 3-24-82, 30-31, and took them to the jury room. Tr. 3-24-82, 31.

The police report was among the exhibits taken into the jury room by the bailiff. Tr. 3-24-82, 34, 43-44. Prior to any vote being taken, the police report was on the table in the jury deliberation room; it was available for any juror to review; some of the jurors examined some of the exhibits; the jurors were free to take exhibits directly out of the stack; and the jurors did take exhibits from the stack from time to time. Testimony of Robert Valleroy (who was jury foreman). Tr.



3-24-82, 37. Although the jury foreman does not recall the police report being discussed orally until after the verdict was entered on count 1, he is not certain as to counts 2 and 3. Tr.

3-24-82, 34. According to another member of the jury, the first discussion of the police report occurred after a vote on all three counts, but, he admitted "I can't say what somebody else knew about" and "possibly someone saw it and didn't say anything -- it could have happened, but yes." Tr. 3-24-82, 43-46.

Although the State attempted, at the hearing before the Oklahoma trial court, to establish that the presence of the police report in the jury room was



the fault of defense counsel,<sup>3/</sup> such position was rejected by the trial court. The trial court found as follows:

The ultimate responsibility rests with the court to control the exhibits that go to the jury . . . I . . . find as a fact . . . that . . . neither counsel had any complicity in the unauthorized exhibit going to the jury room. Tr. 3-24-82, 90.

## 2. Prior Tainted Identification.

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<sup>3/</sup> Counsel for Johnston at the trial was the undersigned counsel, and at the hearing on March 24, 1982, denied any intent to have the police report get before the jury. It was explained that the undersigned counsel, who normally works in document cases, has found that court reporters prefer to have exhibits which are read from during the course of a trial, marked for identification, even when not admitted, in order to facilitate preparation of the transcript. In addition, the undersigned counsel pointed out, that, in his past experience, the court, or a member of the court's staff, normally conducted a session in which documents were reviewed with counsel, prior to being taken into the jury room, and such was not done in this case. Tr. 3-24-82, 82-85. Moreover, there is no rational reason to believe that defense counsel would knowingly permit such a harmful document to reach the jury, if such could be avoided.



At the preliminary hearing, Robinson described the initial photo identification she made of Johnston. When a Midwest City detective, contacted her to show her pictures, he stated that he thought the Midwest City Police Department had apprehended the person who had attacked her. Transcript of Preliminary Hearing, December 7, 1981, page 29, lines 1-5. (Index, Record on appeal, Item 201). He told her that he had just taken a picture of the suspect in the jailhouse. Transcript of Preliminary Hearing, December 7, 1981, page 29, lines 10-12. The pictures were then exposed to her, and she observed that one of the pictures was new and that the rest were old. Transcript of Preliminary Hearing, December 7, 1981, page 29, lines 13-18. During the further cross-examination of Robinson, the



following questions and answers occurred:

Q. [Mr. Woods] You took that [the existence of the single new picture and Detective Askew's [the Midwest City investigating detective] statement that the police had apprehended the person] into account in identifying that person, didn't you?

A. [Miss Robinson] Yes.

Q. [Mr. Woods]. If it hadn't been for that [the existence of the single new picture in the array] you wouldn't be certain that was the person, would you?

A. [Ms. Robinson] No.

Transcript of Preliminary Hearing December 7, 1981, pages 29-30.

At trial, after reciting the facts of the alleged offenses, Robinson was asked to make an in-court identification of Johnston. Defense counsel renewed a prior motion to suppress the identification testimony due to the prior suggestive photographic identifi-



cation. Transcript of Trial at p. 19 (Index, Record on Appeal, Item 204) An in camera hearing was conducted. In the in camera hearing, Robinson stated that, on October 9, 1981, Johnston was a complete stranger to her; that the incident commenced at 8:30 p.m.; and that it was dark at the time. The parking lot where her car was parked was not lighted. She saw the person's face from the light of the moon reflecting off her car. The only time there was any light was during the brief interval during which the person was entering the door to her car. The time interval was "just a second." She did not see the person's face during the interval when the light was on, and she did not see his face after he entered her car. Transcript of Trial, pp. 20-23. (Index, Record on Appeal, Item 204).



During the in camera hearing, Robinson testified further that, in October of 1981, Detective Askew brought some pictures to her. Contrary to her testimony at the preliminary hearing, Robinson stated that when Detective Askew called her to show her the pictures, he did not indicate that he thought he had found the person who committed the crimes. Although she admitted at preliminary hearing that one of the pictures (the one of Johnston) had obviously been recently taken and the others had not, she denied in the in camera hearing that she had noticed such fact. Transcript of Trial, p. 24-37. (Index, Record on Appeal, Item 204).

After hearing the evidence in camera, the court ruled that the conduct of the Midwest City police in the photographic and standup lineup was not so suggestive as to taint identifica-



tion. Transcript of Trial, p. 65. (Index, Record on Appeal, Item 204).

Before the jury, Robinson testified that, subsequent to October 9, Detective Askew brought five pictures to Robinson for her to review. The only photograph that appeared to be made by an instantanic process was the one selected by her as being the person who attacked her. Two of the photographs were old and discolored and she knew that at the time of her choice. Transcript of Trial, pp. 153-157. (Index, Record on Appeal, Item 204); Defendant's Trial Exhibits 2, 3, 4 and 5.

### 3. Additional Background.

Robinson's testimony was highly inconsistent and it was impeached by the other evidence in the case. Examples follow:

A. On the night of the alleged attack, Robinson told the police that



her attacker arrived at the cafeteria in a large orange car, but when it developed that Johnston did not own an orange vehicle, she changed her testimony. Trial Tr. 115-116, 364; Defendant's Exs. 8 and 12.

B. At various stages in the proceedings, Robinson identified several different locations where the rape allegedly occurred, but, before the jury, testified that it occurred at a location near Johnston's home. Trial Tr. 123-128, 303-306; Preliminary Hearing Tr. 47; State's Ex. 9, 29; Defendant's Ex. 1.

C. At the preliminary hearing, Robinson testified that the police advised her that they had found fingerprints in locations where her attacker had put his hands on her car, but, at trial, she denied such fact. (No fingerprints from Johnston were found).



Preliminary Hearing Tr. 33; Trial Tr. 91.

D. All circumstantial evidence was consistent with Johnston's innocence.

E. The alleged rape occurred in Robinson's car and the car was examined immediately after the incident. Legible fingerprints were lifted, hairs were found in the front seat where the alleged rape occurred, and a swab of a wet spot on the front seat (apparently seminal fluid) was taken. In addition, a swab was taken from one of Robinson's nipples which was allegedly licked by her attacker, and there were vaginal smears, vaginal swabs, a vaginal wash, an oral wash, a pubic combing, pubic hairs, etc. Johnston voluntarily permitted the State to take sample hairs and a blood sample from him. After examining all of the physical evidence, a crimi-



nologist from the Oklahoma Bureau of Investigation admitted that he could not state that a single piece of physical evidence taken from Robinson's car came from Thomas Leroy Johnston; that no hair found in the car or body or on Robinson was from Johnston; and that an analysis of saliva from Robinson's nipple possibly excluded Johnston (with the only other possibility being an inadequate sample size). Trial Tr. 394-398, 439-506; Defendant's Exs. 24 (list of items examined by criminologist), 26 (summary of admissions by State's criminologist).

F. Robinson testified that the attacker had no beard, but seven persons, including Johnston's employer, friends, and acquaintances, all testified positively that Johnston had a beard, and a photograph taken on the day after the incident positively showed



that Johnston had a beard. Trial Tr. 61, 69, 134-136, 493-515, 518-534, 541, 555, 568-572, 575, 576-582, 593-600, 608-614, 622, 627-28; Defendant's Ex. 13 (a photo taken on October 10, 1981, the date after the alleged rape according to numerous persons. Id.). This evidence established that the beard was far more than one day's growth.

G. Through the testimony of his employers and others, Johnston demonstrated that he was not at the scene of the alleged crimes at the time they were apparently committed. Specifically, such testimony demonstrated that he was at his place of work past 8:30 p.m., and, due to the distance to the scene of the alleged crime, which according to police records occurred at 8:30 p.m., it was physically impossible for him to be there. See State's Ex. 3; and Trial Tr. 529-531, 542-548, 615-616, 629-639.



IX.

BASIS FOR FEDERAL JURISDICTION  
IN THE DISTRICT COURT.

The District Court had jurisdiction by virtue of 28 U.S.C. § 2254.

X.

ARGUMENT

GROUND I

THE JURY'S CONSIDERATION OF A PREJUDICIAL POLICE REPORT, NOT ADMITTED IN EVIDENCE, GROSSLY VIOLATES JOHNSTON'S RIGHTS UNDER AMENDMENTS V, VI AND XIV TO THE UNITED STATES CONSTITUTION.

Johnston's rights to due process, to a fair trial and to confront the evidence against him under Amendments V, VI and XIV to the United States Constitution were grossly violated by the presence in the jury room, throughout deliberations, of the highly prejudicial police report, when such report was not admitted in evidence. The police report revealed that Johnston was under in-



vestigation for possible charges of attempted rape of another woman, a matter which was not otherwise before the jury in any manner. Moreover, the report contains a highly prejudicial analysis of the factual and procedural background of the alleged crimes against Robinson.

As shown in the factual background, pages 4-7, above, the police report inadvertently reached the jury room at the very outset of deliberations.

The Oklahoma trial court and the Oklahoma Court of Criminal Appeals resolved this serious infringement of Johnston's rights through an asserted factual determination, not supported by the evidence, that the jury did not consider the police report during deliberations on guilt or innocence. There was no positive evidence that none of the twelve jurors saw the police



report during deliberations on the merits, and, indeed, the jurors who testified established that the police report was on the deliberation table in the jury room throughout deliberations; that the exhibits were available for review; that some of the jurors examined some of the exhibits; that the police report may have been discussed during the deliberations on certain counts; and that "possibly someone saw it [the police report] and didn't say anything." Transcript of Motion, at 34, lines 1-11; and at at p. 46, lines 6-7. (Index, Record on Appeal, Item 203).

The Oklahoma Court of Criminal Appeals held that the applicable inquiry was whether there was a "reasonable possibility" that prejudice could have resulted from the jury's examination of the Police Report. Opinion, Oklahoma Court of Criminal Appeals. In consider-



ing the application for Writ of Habeas Corpus, the District Court agreed that the "reasonable probability" standard applied. Opinion by the United States District Court for the Western District of Oklahoma. Although the Tenth Circuit concluded that the correct test was the "slightest possibility" test, it held that, under any standard, petitioner's claim fails. The basis for this conclusion was that "the State Trial Court found that the police report was not used until the sentencing part of the jury deliberations." Without addressing that there was a clear lack of support for such finding in the record, it then concluded that there was a failure to show applicability of any of the exceptions listed in 28 U.S.C. § 2254(d) (1982).

One of the grounds which permits relief under Section 2254(d) is failure



of the record to fairly support the state court's factual determination. The Tenth Circuit wholly failed to address this point, although it was clearly raised by Johnston.

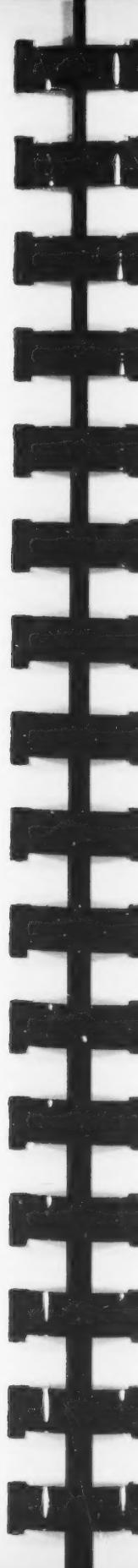
The factual background, given above, clearly demonstrates that, upon consideration of the record as a whole, the Oklahoma court's factual determination was not fairly supported by the record.

A review of the record shows not one iota of evidence that the ten jurors who were not questioned by the Court did not refer to the police report during the deliberations on guilt or innocence. Indeed, the testimony was that the police report was among the exhibits in the stack of exhibits taken into the jury deliberations room, that it was in the jury deliberation room throughout deliberations and that, during delibera-



tions, some of the jurors examined some of the exhibits. Testimony of Robert Valleroy (who was jury foreman). Tr. 3/24/82, 37. Moreover, the jury foreman could not recall whether the report was discussed orally in connection with counts II and III of the indictment. Tr. 3/24/82, 34.

The net result of the treatment given this issue by the state courts and the federal courts below, is to place a burden on petitioner to prove that the unadmitted exhibit was actually considered by the jury. Such a result is contrary to authority in the Fifth Circuit, where it has been held that a respondent need not prove that an unadmitted exhibit was actually considered by the jury and that it may not be assumed that the jury did not see it. U.S. v. Shafer, 455 F.2d 1167 (5th Cir. 1972).



## GROUND II

THE OKLAHOMA COURTS VIOLATED JOHNSTON'S DUE PROCESS RIGHTS AND RIGHT TO FAIR TRIAL BY PERMITTING IN COURT IDENTIFICATION WHICH WAS TAINTED BY A PRIOR IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION

The facts relating to the photographic identification are set out at pages 16 through 20, above.<sup>4/</sup> As shown there, Robinson admitted that the photographic array was presented to her in such a manner as to emphasize Johnston, as his photograph was the only one which was a new photograph, and, in addition, prior to her selecting Johnston from the photographic array, the investigating officer told her that the suspect was in custody and that a picture had been taken of him. Moreover, the complaining

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<sup>4/</sup> Johnston moved to exclude such evidence. See "Motion to Suppress", and Trial Transcript, Index, Record on Appeal, Items 24-31, and 204, respectively.



witness specifically admitted, at preliminary hearing, that her selection of the photograph of Johnston from the array was influenced by the manner in which the presentation was made to her, and that, but for Johnston's picture being the only recent photograph, she would not have been certain that Johnston was the attacker. Transcript of Preliminary Hearing, 12/7/81 pp. 2-3. (Index, Record on Appeal, Item 201). The highly suspect nature of the photographic identification is further established by the lack of any need to have a photographic identification, since Johnston was in custody and a standup line up could have been conducted.

It is respectfully suggested that the Oklahoma courts, in this case, decided this matter in a manner in conflict with applicable decisions of



the United States Supreme Court.

United States v. Wade, 388 U.S. 213, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967); Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968).

In Wade, the Court observed that mistaken identification is a significant problem aggravated by suggestiveness in the manner in which the prosecution sometimes presents a suspect to witnesses for identification. Wade, 388 U.S. at 228, 18 L. Ed. 2d at 1158. In Wade, the Court went on to recognize that such abuses present a particular hazard in rape cases. In Simmons, supra, the Court established that the test is whether there was such a degree of impermissible suggestiveness as to give rise to a very substantial likelihood of misidentification.

The Supreme Court has set out a "five factor test" to be applied in



making such determination. Simmons, supra; Manson v. Brathwaite, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 978 S. Ct. 2243 (1977). The five factors are as follows:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness' degree of attention;
3. The accuracy of the witness' prior description of the criminal;
4. The level of certainty demonstrated by the witness at the confrontation; and
5. The length of time between the crime and the confrontation.

As to the first factor, the alleged crimes occurred at a time when it was dark. Prior to the time the perpetrator entered Robinson's car, she only saw his face from the light of the moon reflecting from her car, and, after the person



got in her car, she did not see his face. Transcript of trial, pp. 20-23.<sup>5/</sup> Thus, she had only a limited opportunity to view the perpetrator at the time of the crime.

Under factor three of the Simmons and Manson test, Robinson's description, at the time of the crime, is inconsistent with Johnston's characteristics. At the time of the alleged crimes, Johnston was 33 years of age. Defendant's Exhibit 15. The composite drawing, made the night of the alleged

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5/ The foregoing testimony was given during the course of an in camera hearing. See trial transcript 21-23, 138. During testimony before the jury, however, the thrust of her testimony was completely different. Before the jury, Robinson stated that there was considerable light, including her dash board lights, the lights in the front of her car, and the moon, and that she was "able to get a good look" at her attacker's face. Trial transcript, 85.



incident, indicates that Robinson told the authorities that her attacker was 26 or 27 years of age. Defendant's Exhibit 8. The composite drawing is consistent with a person in the 26 to 27 year age bracket.

Without Robinson's positive in-court-identification of Johnston, there would have been no basis whatever for the jury to conclude that Johnston committed the crimes. Indeed, the trial court observed, during the course of overruling defendant's demurrer to the evidence:

This is certainly not the strongest rape case I have ever heard by any means . . . the question is about the identity of the defendant. And . . . there is some evidence which weakens her testimony. Tr. 492.

Thus, any error by the trial court in overruling the Motion to Suppress



Identification Testimony was clearly prejudicial.

The Tenth Circuit specifically found that the identification procedure was "impermissibly suggestive." Opinion of the United States Court of Appeals for the Tenth Circuit. Moreover, it found that the Oklahoma Court of Criminal Appeals did not, as required under Simmons v. United States, 390 U.S. 377, 384 (1968), consider whether the identification was reliable in view of the totality of the circumstances. The Tenth Circuit however, concluded that it was reliable. It is submitted that this conclusion was clearly erroneous, because Robinson specifically admitted that she took into account the existence of the single new picture and the detective's statement that the person



had been apprehended into account in identifying Johnston, and that, but for the existence of the single new picture in the array, she would not have been certain that Johnson, who was the person in the new picture, was her attacker. Transcript of preliminary hearing, December 7, 1981, pages 29-30. These facts exclude the possibility of a reliable identification at the photographic line-up or at any line-up thereafter.

XI.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons Johnston prays that this Court issue a Writ of Certiorari to the Court below, and after a full review of the matter, remand this action with instructions to the courts below to forthwith issue a Writ of Habeas Corpus, directing that Johnston



be released from custody with respect to  
said conviction.

  
HARRY A. WOODS, JR.

Of the Firm:

CROWE & DUNLEVY  
A Professional Corporation  
1800 Mid-America Tower  
20 North Broadway  
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(405) 235-7700

ATTORNEY FOR PETITIONER  
THOMAS LEROY JOHNSTON

Certificate of Service

I hereby certify that three true  
and correct copies of the above and  
foregoing has been mailed, postage  
pre-paid, on this 29<sup>th</sup> day of October  
1987, to Robert Henry, Attorney General  
of the State of Oklahoma, 112 State  
Capitol Bldg., Oklahoma City, OK 73105.

  
Harry A. Woods, Jr.

HAW07187



APPENDIX

TO

PETITION FOR CERTIORARI



INDEX TO APPENDIX

DOCUMENT DESCRIPTION

A. Opinion, Tenth Circuit Court of Appeals, Johnston v. Makowski, et al., No. 96-1751

07/07/87

B. Memorandum Opinion, U. S. District Court for the Western District of Oklahoma, Thomas L. Johnston v. John Makowski, et al. No. CIV-85-2130- R.

04/14/86

C. Opinion, Court of Criminal Appeals, State of Oklahoma, Thomas L. Johnston v. State of Oklahoma, No. F-83-152

12/22/83

D. Judgment, Johnston v. Makowski, U. S. District Court, Western District, Oklahoma, No. CIV-85-2130-R

04/14/86



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UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

THOMAS LEROY JOHNSTON,	)	
Petitioner/Appellant,	)	
v.	)	No. 86-1751
JOHN MAKOWSKI, Warden of Conners Correctional Center,	)	
and MICHAEL C. TURPEN, Attorney General of the State of Oklahoma,	)	
Respondents-Appellees.	)	

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Appeal from the United States  
District Court for the  
Western District of Oklahoma  
(D.C. No. CIV-85-2130-R)

Harry A. Woods, Jr., and Crowe & Dunlevy,  
Oklahoma City, Oklahoma, for Petitioner-  
Appellant.

John Galowitch, Assistant Attorney  
General, State of Oklahoma (Michael C.  
Turpen, Attorney General, and Daman H.  
Cantrell, Assistant Attorney General,  
with him on the brief), for Respondents-  
Appellees.

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Before ANDERSON, TACHA and TIMBERS\*,  
Circuit Judges.

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TIMBERS, Circuit Judge.

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Appellant Thomas Leroy Johnston ("appellant") appeals from a judgment entered April 14, 1986, in the Western District of Oklahoma, David L. Russell, District Judge, which denied appellant's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982). Appellant is a prisoner of the State of Oklahoma, having been convicted after a jury trial of rape, oral sodomy, and kidnapping for the purpose of extorting sexual gratification. He is serving concurrent prison sentences of 50 years on each count.

On appeal, appellant claims, as he did in the district court, that the jury's consideration of a police report which was not admitted in evi-



dence violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and that the Oklahoma trial court violated his due process rights by permitting an in-court identification which he asserts was tainted by a prior impermissibly suggestive photograph identification.

We hold that, upon the facts as found by the Oklahoma trial court, to which we defer, appellant's rights were not violated by the presence of the police report in the jury room during deliberations. We further hold that, although the photographic identification was impermissibly suggestive, under the totality of the circumstances appellant's due process rights were not violated.

We affirm.



I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

On the evening of October 9, 1981, Theresa Robinson, then seventeen years of age, left her place of employment in Midwest City, Oklahoma, and walked to the parking lot. As she entered her car, a man approached her. Outside her car he spoke with her for approximately ten minutes, attempting to convince her to accompany him to a bar. When she turned away from the man to drive away, she felt a sharp instrument on the back of her neck. The man forced his way into her car and drove to a secluded area, where he sodomized and raped her. He then fled on foot.

Robinson drove immediately to the Midwest City Police station to report the rape. She gave an identifi-



cation of her attacker, stating that he was approximately 27 years old, about six feet tall, with dark brown hair and hazel eyes. A composite drawing of the attacker was made by the police that evening. She described to the police with particularity the shoes her assailant was wearing and returned later with a newspaper advertisement depicting similar shoes.

One week after the incident, Robinson was shown a photo array which did not contain a picture of appellant. Robinson did not identify her attacker from the array.

Some time in the latter part of October, the investigating officer -- Detective Ted Askew -- was told by a fellow officer that appellant was in custody as a suspect in another rape case. Detective Askew went to speak with appellant and, during interroga-



tion, took a photo of him and seized his distinctive shoes. Askew then made another photo array, which consisted of several old pictures and the newly taken one of appellant.

Robinson viewed the new array in early November. She identified appellant as her assailant, on the basis of the second photo array and at a subsequent lineup.

On November 9, 1981, appellant was charged in an information filed in the Oklahoma state trial court with the crimes of first degree rape, oral sodomy, and kidnapping for the purpose of extorting sexual gratification.

On December 7, 1981, at a preliminary hearing on the information, Robinson testified that Detective Askew had told her before showing her the second photo array that the police had a suspect in custody and had just taken



his picture. She testified further that she had taken this into account when she identified appellant from the array and that other wise she would have been unsure that the photo was of her assailant.

Appellant was tried during the period July 16-18, 1982. Robinson's testimony at trial differed from her testimony at the preliminary hearing. She testified at trial that Detective Askew had told her -- after she had identified appellant from the second photo array -- that the police had him in custody and that he was a suspect and that she had been confused at the preliminary hearing. She testified further that she was able to identify appellant as her assailant and did not need the photo to identify him.

After the court's charge, the jury retired to deliberate. The court



reporter and bailiff gathered approximately 80 exhibits and delivered them to the jury room. Inadvertently included in the material delivered was a defense exhibit which had been marked for identification only but had not been received in evidence. The exhibit was a police report which had been prepared by Detective Askew and which defense counsel had used during cross examination. On page two of the three page report there was a statement that "[i]t was brought to Det. Askew's attention by Det. K. Anderson that she was preparing to file charges on the above suspect [appellant] for attempted rape." The attempted rape charge referred to in the report was unrelated to the rape of Robinson and was not brought to the jury's attention.

The jury returned verdicts of guilty on each of the three counts and



fixed punishment at 99 years on each count.

Appellant filed a motion in the state trial court for a new trial and for a hearing concerning the presence of the police report in the jury room. On March 24, 1982, the court held an evidentiary hearing on the motion. The court heard testimony from the court reporter, the bailiff, the jury foreman -- Robert P. Valleroy -- and another juror -- William G. Cochran. Valleroy testified that he was absolutely certain that the police report had not been discussed until after the verdict on the rape count had been reached. He stated that the report therefore had no bearing whatever on the rape conviction. He testified further that he was 99% certain that the report had no bearing on the verdict as to the sodomy and kidnapping counts. Cochran testified



that no mention of the report was made in the jury room until that part of the deliberations concerning sentencing.

At the conclusion of the hearing, the trial judge found that the jury had received the exhibit improperly but had not considered it until the sentencing part of the deliberations. The court therefore granted appellant's motion for a new trial as to sentencing only. After a new trial as to sentencing, the new jury fixed appellant's sentence at 50 years on each count, to run concurrently.

The Oklahoma Court of Criminal Appeals affirmed appellant's convictions. Johnston v. State, 673 P.2d 886 (Okla. Cr. 1981), the Court of Criminal Appeals held that the applicable inquiry was whether there was a "reasonable possibility" that prejudice could have resulted from the jury's examination of



the police report. The court reviewed the testimony of the two jurors and concluded that the trial judge had rectified any possible harm by ordering a new trial as to sentencing. The court also rejected appellant's claim that the second photo array was so impermissibly suggestive as to taint the subsequent in-court identification. The court followed the guidelines set forth in United States v. Wade, 388 U.S. 218 (1967), and determined that, under the totality of the circumstances, the identification of appellant was reliable.

On February 23, 1984, appellant filed in the United States Supreme Court a petition for certiorari which was denied June 4, 1984. - Johnston v. Oklahoma, 467 U.S. 1228 (1984).

Appellant filed the instant habeas petition on August 23, 1985. He



raised the same claims as were addressed by the Oklahoma courts and which are before us on the instant appeal. The district court denied the petition in an opinion filed April 14, 1986. Judgment was entered the same day. By an order entered April 23, 1986, the district court granted appellant's application for a certificate of probable cause. This appeal followed.

For the same reasons set forth below, we affirm the judgment of the district court.

## II.

### A. The Police Report

Courts have applied varying legal standards to determine whether the jury's use of exposure to extrinsic material requires a new trial. E.g., United States v. Griffith, 756 F.2d 1244, 1252 (6th Cir.) (trial judge should determine whether jury actually



used material and whether there was prejudice to the defendant; trial court's decision will be reviewed under abuse of discretion standard), cert. denied, 106 S. Ct. 114 (1985); United States v. Camporeale, 515 F.2d 184, 188 (2d Cir. 1975) ("evidence was so prejudicial that the defendant was denied a fair trial"); United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975) (new trial required if there is a "reasonable possibility" that the defendant was prejudiced); United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973) ("if there is the slightest possibility that harm could have resulted from the jury's viewing of unadmitted evidence, then reversal is mandatory." cert. denied, 416 U.S. 986 (1974); Edwards, supra, 637 P.2d at 887 ("reasonable possibility" standard).



In the instant case, neither the Oklahoma Court of Criminal Appeals nor the district court applied the "slightest possibility" standard of Howard, supra, 506 F.2d at 869, and Edwards, supra, 637 P.2d at 887. The district court applied the "so prejudicial" standard of the Second Circuit in Camporeale, supra, 515 F.2d at 188.

We agree with appellant that the applicable standard in this Circuit is the "slightest possibility" standard of Marx. We hold, however, that, under any standard, appellant's claim fails. The state trial court found that the police report was not used until the sentencing part of the jury deliberations. Absent the applicability of one of the exceptions listed in 28 U.S.C. § 2254(d) (1982), that finding of fact must be accorded the presumption of



correctness. Kuhlmann v. Wilson, 106 S. Ct. 2616, 2630 (1986); Sumner v. Mata, 449 U.S. 539 547 (1981). Appellant has advanced no persuasive argument that any of those exceptions apply. We therefore accept the correctness of the state trial court's finding that the jury did not consider the police report during the determination of guilt phase of the jury deliberations. Any conceivable prejudice was cured by the new trial as to sentencing. It is clear that appellant's claim fails even under the stringent standard of Marx.

Accordingly, we hold that, upon the facts as found by the Oklahoma trial court, to which we defer, appellant's rights were not violated by the presence of the police report in the jury room during deliberations.



B. The Photo Array

The inquiry required by the due process clause when an identification procedure is challenged is two pronged: first, it must be determined whether the identification procedure was impermissibly suggestive; and, second, if it is found to have been so, whether the identification nevertheless was reliable in view of the totality of the circumstances. See Simmons v. United States, 390 U.S. 377, 384 (1968). The two prongs of the inquiry should be made separately; it is necessary to reach the second prong only if the procedure was impermissibly suggestive. In reaching its conclusion that the identification did not violate appellant's rights, the Oklahoma Court of Criminal Appeals did not consider the two prongs separately, but examined the totality of the circumstances to determine whether the proce-



dure was impermissibly suggestive. We have examined the two prongs of the inquiry separately.

We believe that the second photo array was impermissibly suggestive since appellant's picture obviously was newly taken, whereas the other pictures were visibly older. Appellant's claim nevertheless fails. Under the totality of the circumstances, the identification of appellant clearly was reliable. The factors that we have considered in determining the reliability of the identification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. Against these factors is to be weighed the



corrupting effect of the suggestive identification itself." Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

Appellant spoke with Robinson for approximately ten minutes before abducting her. In total, appellant was in her view for 45 minutes. She testified that, although the parking lot was not lit, she could see his face because of the moonlight and the overhead light in her car. She gave a description of him immediately after the crimes had been committed. The description was very close to appellant's actual appearance. Robinson described his unique shoes and supplied the police with a newspaper advertisement depicting a similar pair.

Moreover, the state appellate court had before it the composite drawing made on the night of the rape and commented on its likeness to appellee.



lant. The court also had the photo array and line-up pictures. Based on a review of them, the court declined to find such improper suggestiveness as to exclude the subsequent in-court identification. The ultimate conclusion of that court is supported fully by the record.

We hold that, although the photographic identification was impermissibly suggestive, under the totality of the circumstances appellant's due process rights were not violated.

### III.

To summarize:

We hold that, upon the facts as found by the Oklahoma trial court, to which we defer, appellant's rights were not violated by the presence of the police report in the jury room during deliberations. We further hold that, although the photographic identification



was impermissibly suggestive, under the totality of the circumstances appellant's due process rights were not violated. The district court therefore correctly denied appellant's petition for a writ of habeas corpus.

AFFIRMED.

HAW07787



IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

THOMAS LEROY )  
JOHNSTON, )  
 )  
Petitioner, )  
 )  
vs. ) CIV-85-2130-R  
 )  
JOHN MAKOWSKI and )  
the Attorney )  
General of the )  
State of Oklahoma, )  
 )  
Respondents. )

MEMORANDUM OPINION

Petitioner Thomas Leroy Johnston  
seeks a Writ of Habeas Corpus pursuant  
to 28 U.S.C. Section 2254. Petitioner  
Johnston was convicted in Oklahoma  
County District Court by judgment  
entered September 28, 1982, on charges  
of rape, sodomy, and kidnapping.  
Petitioner appealed his conviction and  
sentence to the Oklahoma Court of



Criminal Appeals which affirmed the trial court's judgment. Petitioner's counsel, who has represented Petitioner throughout his state court proceedings, has filed a brief in support of the application for a writ and a reply to the Respondent's brief. Based on the record and briefs filed herein, the Court enters the following findings and conclusions:

I

Petitioner Johnston presents two grounds for reversal of his conviction. Petitioner alleges that his rights to due process, to a fair trial and to confront the evidence against him under the Fifth, Sixth, and Fourteenth Amendments to the Constitution were violated when a highly prejudicial exhibit not admitted into evidence was taken to the jury room. Secondly, Petitioner alleges



that his rights to due process and to a fair trial were violated by the trial court's admission of an in court identification which tainted by a prior suggestive photographic identification. Both of Petitioner's grounds for reversal were presented and considered in Petitioner's state court appeal. The U.S. Supreme Court denied certiorari in the Petitioner's application to that court.

28 U.S.C. Section 2254(d) requires federal courts considering an application for a writ of habeas corpus by a state prisoner to presume the accuracy of the findings of fact made by the state courts except under limited circumstances. Sumner v. Mata, 455 U.S. 591 (1982). Federal courts must accept a state court's interpretation and application of its constitution and laws



unless they are inconsistent with fundamental principles of liberty and justice. Silva v. Fox, 351 F.2d 61 (10th Cir. 1965). The federal habeas corpus petitioner has the burden of establishing by convincing evidence that the state court determinations were erroneous. LaVallee v. Delle Rose, 410 U.S. 690 (1973).

## II

The extraneous evidence which was taken to the jury room prior to the jury's deliberations in the Petitioner's trial was a police report marked for identification but never offered or admitted into evidence. This report was prepared by the state's witness, Detective Askew, during his investigation of the crimes Petitioner was charged with. Halfway down the second page of the



three-page report appeared this sentence: "[I]t was brought to Det. Askew's attention by Det. K. Anderson that she was preparing to file charges on the above suspect for attempted rape." The attempted rape charge was not before the jury and was not otherwise brought out at trial. This report was not a part of the state's evidence, but portions of it were used by defense counsel in its cross-examination of Detective Askew. The report, along with some eighty other pieces of evidence admitted during the five day trial, was transported to the jury room by the bailiff immediately following the jury's seclusion for deliberations. The jury returned a verdict of guilty on all three counts and then heard testimony in the second stage sentencing proceeding. The jury sentenced Petitioner to 99



years on each count. Petitioner's post-trial motion for a new trial was based, inter alia, on the jury's receipt of the unadmitted policy report. The trial judge granted a hearing on the motion for new trial and heard the testimony of the court reporter, the bailiff, the foreperson of the jury, and one juror who had served during Petitioner's trial. Following this hearing in which both the prosecutor and defense counsel extensively questioned the witnesses, the trial judge concluded that the jury had improperly received the exhibit but had not considered it until sentencing deliberations. The court granted Defendants' motion for new trial as to the second stage sentencing proceeding only. A new jury was empaneled and another sentencing proceeding was held, which included evidence of a



former rape conviction. The new jury sentenced Petitioner to fifty years on each count.

Petitioner's claims of prejudice and resultant infringement of constitutional rights from the jury's receipt of the unadmitted police report were rejected by the Oklahoma Court of Criminal Appeals which concluded that any possible harm caused by the jury's receipt of the exhibit was rectified by the trial court's grant of a new trial as to punishment. The appeals court noted that defense counsel had some responsibility as to what evidence reached the jury. The case of Edwards v. State, 637 P.2d 886 (Okl. Cr. 1981) was cited by the court as establishing the legal standard applicable in Oklahoma to determine whether reversal was required when a jury examines extraneous



evidence. The standard enunciated by the appeals court requires reversal only when there is a "reasonable possibility the (sic) prejudice could have resulted from a jury's examination."

Petitioner contests the finding by the trial court that the police report was not considered during jury determinations on guilt or innocence. In addition, Petitioner contends that proof of actual consideration is not necessary where the likelihood of prejudice is readily apparent. Petitioner urges that the proper test to be applied is whether the jury had an opportunity to consider the extraneous, prejudicial material.

Respondents assert that the likelihood of prejudice or a reasonable possibility thereof must be shown to warrant a reversal. Respondents also assert that petitioner failed to



demonstrate any prejudice since the jurors testified that the report was not discussed until the final verdict of guilty was reached on all counts. Respondents urge that objection to any error resulting from the presence of the exhibit in the jury room was waived because of Petitioner's own negligence in failing to screen the exhibits which went to the jury room.

Although a jury's use of extrinsic material or exposure to extraneous matter is error, courts have applied many varying standards to determine whether such use requires a new trial. See cases collected in U.S. v. Griffith, 756 F.2d 1244 (6th Cir. 1985). Errors of a constitutional magnitude must not always be deemed harmful and may be found harmless if there is proof beyond



a reasonable doubt that the constitutional error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 21-22, 24 (1967). Put in a different way, the standard is whether there is a reasonable possibility that the extrinsic evidence contributed to the conviction. Schneble v. Florida, 405 U.S. 427 (1972); Bond v. Oklahoma, 546 F.2d 1369 (10th Cir. 1976); Edwards v. State, 637 P.2d 886 (Okl. Cir. 1981). If extraneous evidence is in the jury room for a considerable time then it may not be assumed that the jury did not see it. U.S. v. Shafer, 455 F.2d 1167 (5th Cir. 1972).

If there is reason to believe that the jury was exposed to prejudicial information, an inquiry of the jurors is warranted and the trial judge must



investigate the effect of such error.

U.S. v. Moten, 528 F.2d 654, 666 (2nd Cir. 1978); U.S. v. Vento, 533 F.2d 838, 869 (3d Cir. 1976); U.S. v. Thomas, 463 F.2d 1061, 1065 (7th Cir. 1972).

The record does not reveal whether or not any discussions were held regarding the court's procedures for taking evidence to the jury room. Apparently, the bailiff and the court reporter just gathered up the exhibits and took them to the jury room. This court is of the opinion that counsel for both parties have the responsibility to review the evidence being taken to the jury room.

U.S. v. Strassman, 241 F.2d 784, 786 (2d Cir. 1957); U.S. v. Yoppolo, 435 F.2d 625, 627 (6th Cir. 1970); U.S. v. Campoleale, 515 F.2d 184, 188 (2d Cir. 1975). Placing the responsibility on one or the other counsel or on the court



would be plainly illogical given each counsel's familiarity with its own exhibits.

In this case, the delivery of the unadmitted policy report to the jury room was clearly error. Regardless of who was responsible for the error, and it appears from the record that defense counsel was made aware at some point during the trial of the exhibit's placement among the other pieces of evidence by the court reporter but failed to take any steps to remove the exhibit or object to its transferal to the jury room, the record shows that the trial court recognized the error's potential for prejudice and met its duty to investigate the effect of the error on the jury's deliberations.

The difficult task remaining for this Court is determining whether on the



record as a whole the error that occurred here was so prejudicial that the defendant was denied a fair trial. U.S. v. Camporeale, supra. The measures taken by the trial judge to mitigate the effects of the error must certainly have some bearing on the determination of whether the defendant received a trial consistent with Constitutional requirements. The strength of the state's case should also have some bearing on this issue.

The court's determination as to the possibility of prejudice to the Petitioner is made somewhat easier by the testimony of two jurors taken during the hearing on the defendant's motion for new trial. One of the jurors questioned stated that, although the jurors had access to all of the exhibits in the jury room, no mention was made of the



police report's reference to another criminal charge against the Petitioner until after verdicts were rendered on all three counts. The other juror questioned at the post-trial hearing, the foreperson of the jury, stated that he was certain the police report was not discussed until after the verdict on the first count, the rape charge, had been taken. He was also certain that the information in the police report had no bearing whatsoever on the verdict on the rape count. Although he wasn't sure whether or not the police report was discussed before the verdicts were rendered on the second and third counts, the sodomy and kidnapping charges, he was 99 percent certain that it had no bearing on those counts. The juror testified that numerous exhibits were examined, but the police report did not



come to anyone's attention until after the votes were taken. Significantly, one of the jurors testified that from the manner in which the remark was made concerning the police report, the juror who made the remark had just observed the report at that time.

Although the Petitioner need not prove that the extraneous exhibit was actually read and considered by the jury to show prejudice, U.S. v. Shafer, supra at 1170 (5th Cir. 1972), it is also not the Respondents' burden to positively prove that the exhibit was not read by any of the jurors. What this court must find is a reasonable possibility that the exhibit's reference to another crime contributed to the verdict before a reversal is necessary. The record does not expressly indicate the length of the jury's deliberations. However, the



deliberations could not have taken more than a few hours because of the fact that jurors heard instructions, closing arguments, deliberated the issue of innocence/guilt, heard the second stage proceeding, and deliberated and reached a verdict on sentencing all in the same day.

The passage itself was only one sentence of a three page police report, many parts of which the jury was familiar with from the testimony heard in open court. Moreover, there were some eighty exhibits taken to the jury room that day. The testimony of the jurors creates no reasonable suspicion that their guilty verdict was influenced by the passage.

The jury could reasonably have found Petitioner guilty on all three counts based only on the direct evidence



presented in the form of the victim's unwavering identification of Petitioner. Circumstantial evidence supported a guilty finding, including testimony placing the suspected crime scene close to Petitioner's residence, the time span between 8:00 and 8:45 that is unaccounted for in Petitioner's alibi defense, the identification of Petitioner's shoes as the shoes worn by the victim's attacker, the victim's description of her attacker, physical evidence in the form of blood antigen taken from the victim not inconsistent with Petitioner's blood group, and testimony by a local police officer that Petitioner resembled someone seen by the officer that same evening in the near vicinity of the kidnapping. In view of the foregoing, this court finds no reasonable possibility exists that the



extraneous exhibit contributed to the jury's guilty verdict or so prejudiced the Petitioner that a new trial is warranted. The trial judge's finding that the police report was not considered during the first stage of the trial does not reflect an abuse of discretion. Because of the bifurcated procedure involved in Oklahoma after-former-conviction prosecutions such as Petitioner's, the trial judge was able to effectively mitigate the potential for prejudice to Petitioner by empaneling a new jury and holding another sentencing proceeding. The fact that the sentence given the Petitioner in the later sentencing proceeding was must less than the first jury's verdict (50 years on each count as opposed to 99 years on each count under the first jury's verdict) lends credence to the trial



court's ruling that prejudice to the Petitioner occurred during the sentencing phase of his trial, if at all.

### III

Petitioner's second ground asserted for reversal of his conviction concerns the procedure used by the police detective in a photographic lineup in which the victim first identified Petitioner as her kidnapper and attacker. Petitioner contends that the subsequent in-court identification of Petitioner by the victim was impermissibly tainted by the prior photo lineup and should not have been admitted as evidence.

The Petitioner raised the issue of a tainted identification in a pretrial motion to suppress and renewed the objection at trial. Petitioner argues again in his habeas corpus application



that the manner in which the photographic array was presented to the victim so emphasized Petitioner that his due process rights and right to a fair trial were violated by the subsequent in-court identification of Petitioner.

The Supreme Court has addressed the recurring problem presented by the use of photographic lineups:

"There is always some danger in a photo identification procedure that the witness may make an incorrect identification. This danger is increased if the policy display to the witness only the picture of a single individual who generally resembles the person he saw, or if police show the witness pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized, or if police indicate to the witness that they have other evidence linking one of the persons pictures to the crime."  
Simons v. U.S., 390 U.S. 377, 383 (1968)



Petitioner contends that his picture was the only new picture in the lineup shown to the victim and that prior to her identification of Petitioner the victim was told by the police detective that Petitioner was in custody. The following testimony was given by the victim at the preliminary hearing in regard to the photo identification of Petitioner:

Q. Did he [Det. Askew] tell you prior to showing you those pictures or while he was there, that they had apprehended a person?

A. After I identified him  
.

\* \* \*

Q. Did he say anything at all about they found the person that did it?

A. I think he did.

Q. What did he say about that?



A. He said that they think they go [sic] him, that's all he said.

Q. Did he saw anything else about that?

A. No.

Q. Did he say when they had gotten him?

A. No.

Q. Did they say they had just taken a picture of him in the jailhouse?

A. Yes.

Q. And when those pictures were brought to you, could you tell if any of them were new?

A. Yes.

\* \* \*

Q. And you thought that since this was true, is it not, that because there was a new picture, and he told you that they thought they had caught the person, you believed he was telling you this was the person, didn't you?

A. No.



Q. You took that into account when identifying that person, didn't you?

A. Yes.

Q. If it hadn't been for that you wouldn't be certain that was the person, would you?

A. No.

At trial, the victim testified that the detective had called her and "told me he had some pictures to show me. After I identified the man, he told me that he had just arrested the man." The victim testified that she had not understood the earlier line of questioning at the preliminary hearing regarding the photos and her identification. The victim also testified that at the time she made her identification of Petitioner she could tell that two of the pictures were old because they were discolored and one of the pictures, that of Petitioner, was taken by an instamatic camera, but she



did not notice the dates appearing on the other two pictures in the lineup.

The Oklahoma Court of Criminal Appeals, following the guidelines of U.S. v. Wade, 388 U.S. 218 (1967), held the identification of the Petitioner had sufficient independent indicia of reliability and rejected Petitioner's assignment of error as being without merit. The State Court made the following findings of fact:

"T. R. never wavered in her identification of appellant as her assailant. The description she gave to police the night of the attack was a rather good description of appellant, especially viewing the composite drawing made at the police station that night. The discrepancies were not that great. Neither were the differences between appellant and the other men in the lineups.

And, although appellant was not abducted from a well lighted area, she spent about forty-five minutes with him



and was aided by moonlight and the vehicle's overhead light in viewing the assailant. T.R. appeared to have altered her testimony since the preliminary hearing because now on cross-examination when asked whether the police officer told her that he thought they had captured her assailant and had just taken his picture which was added to the second photographic lineup, she denies that the police officer made these remarks though initially she agreed that he had. She confessed that she was confused by this line of questioning at preliminary hearing, and had thought defense counsel meant something else when she gave affirmative answers."

In making its findings, the state court appropriately considered the totality of the circumstances to determine the reliability of the in-court identification. U.S. v. Williams, 605 F.2d 495, 498 (10th Cir. 1979), cert. denied, 444 U.S. 932.

In federal habeas proceedings, factual determinations made by the state



court are presumed to be correct unless the statutory exceptions in Section 2254(d) apply or the findings are unsupported by the record. Sumner v. Mata, supra at 597-598 (1982) (per curiam). Federal courts must show a high level of deference to a state court's fact finds. Id. at 598. It is the Court's opinion that the state court fact findings are supported by the record and the presumption of correctness must be applied. Moreover, Petitioner's lengthy cross-examination of the victim as to her identification of Petitioner at the preliminary hearing, at an in camera hearing, and at trial substantially lessened any danger of misidentification. Simmons v. U.S., supra at 384. Based on a thorough review of the record, this Court holds that the procedures used by the



detective were not so suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Id. It is significant that the victim responded to clearly-worded cross-examination questions both at preliminary hearing and at trial that she identified Petitioner before she was told that he was in custody.

Because this Court finds no evidence of constitutional error sufficient to vitiate Petitioner's conviction, judgment will enter denying Petitioner's application for a Writ of Habeas Corpus.

Entered this 14th day of April, 1986.

/S/ David L. Russell  
DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE

HAW08087



IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

THOMAS LEROY )  
JOHNSTON, )  
 )  
Appellant, )  
 )  
v. ) Case No. F-83-152  
 )  
THE STATE OF )  
OKLAHOMA, ) FILED ON 12/22/83  
 )  
Appellee. )

O P I N I O N

CORNISH, Judge:

Thomas Leroy Johnston was convicted by a jury in Oklahoma County District Court of Rape in the First Degree, Oral Sodomy, and of Kidnapping for the Purpose of Extorting Sexual Gratification. Punishment was assessed as fifty (50) years' imprisonment on each count, to run concurrently, and he appeals.



On the evening of October 9, 1981, at approximately 8:30 p.m., the victim, T. R., completed her assignments as the cashier of a cafeteria located at Southeast 15th and Air Depot in Midwest City. T. R. entered her automobile in the unlit parking lot. Suddenly, a man walked in front of her vehicle and came to the window and spoke with her.

Their conversation lasted about ten minutes. As she turned her head preparing to leave, she felt a sharp metal object placed against her neck by the man. He forced his way into T.R.'s automobile and ordered T. R. to keep her head down on the seat. The man drove the automobile a short distance to a secluded spot, requiring T. R. to sodomize him as they traveled, and then raped and sodomized T. R. The assailant drove the automobile a short distance and fled on foot in the direction of the



parking lot where T. R. had been abducted. T. R. immediately drove to the local police station, giving a description of her assailant and recounting the details of the assault to police officers. She identified the defendant as her assailant during the second photographic lineup that she observed, and again at a live lineup, as she did also at trial.

Appellant first asserts as error the trial court's refusal to suppress the pretrial and courtroom identification of defendant by T. R. Appellant asserts that the identifications were the product of impermissible suggestiveness. We held in Carroll v. Tate, 568 P.2d 324, 326 (Okl. Cr. 1977), that to determine whether pretrial identification procedures followed by police investigators violate due process, the totality of the circumstances



must be considered to see if they created a "very substantial likelihood of irreparable misidentification."

In the instant case, T. R. gave the police a description of her attacker on the evening of the assault. She stated that he was six feet or six feet one inch tall. He had dark brown hair, hazel eyes, was clean shaven, and was about 26 or 27 years old. Appellant is five feet ten inches tall, dark brown hair, hazel eyes, 33 years old, and provided evidence that he may have had a beard on October 9, 1981. T. R. was shown within a few weeks of the attack a set of five or six photographs of men who generally fit the description she gave to police. She failed to identify any of these. The investigating officer again showed her a set of photographs which then included a photo of appellant sometime in early November, 1981. At



this time, she identified appellant. She later identified appellant at a standup lineup. She also identified the shoes appellant wore when arrested as those she had tried to describe to the officer earlier and of which she had supplied an advertisement picture of similar shoes.

Appellant claims the second photographic lineup was too suggestive because T. R.-may have been told that a new photograph was included of a man in custody, and because the other pictures were obviously older. Also, he claims the standup lineup was too suggestive because the other men did not have hazel eyes as did appellant and their ages varied from his. We have carefully reviewed the photographs shown to T. R. and that of the participants in the standup lineup and fail to find such improper suggestiveness to exclude the



subsequent in-court identification. The guidelines we considered are those we adopted from United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), including:

(1) the prior opportunity to observe the alleged criminal act; (2) the existence of any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification of another person prior to the lineup; (4) the identification of the defendant on a prior occasion; (5) failure to identify the defendant on a prior occasion; and, (6) the lapse of time between the alleged act and the lineup identification.

McDaniel v. State, 576 P.2d 307, 309 (Okl. Cr. 1978). We find that the lineup and T. R.'s in-court identification of appellant pass muster under our guidelines adopted to determine independent indicia of reliability. T. R. never wavered in her identification of appellant as her assailant. The



description she gave to police the night of the attack was a rather good description of appellant, especially viewing the composite drawing made at the police station that night. The discrepancies were not that great. Neither were the differences between appellant and the other men in the lineups. And, although appellant was not abducted from a well lighted area, she spent about forty-five minutes with him and was aided by moonlight and the vehicle's overhead light in viewing the assailant. T. R. appeared to have altered her testimony since the preliminary hearing because now on cross-examination when asked whether the police officer told her that he thought they had captured her assailant and had just taken his picture which was added to the second photographic lineup, she denies that the police officer made these remarks though



initially she agreed that he had. She confessed that she was confused by this line of questioning at preliminary hearing, and had thought defense counsel meant something else when she gave affirmative answers. The police officer who showed her the photographs and standup lineup also denied having made such remarks. This assignment of error is without merit.

Next, appellant contends that the charges against him should have been dismissed at the conclusion of the preliminary hearing for lack of probable cause. 22 O.S. 1981, § 264. His primary complaint is that there was insufficient evidence to show that the sexual intercourse was against T. R.'s will or resisted by her. We find this proposition meritless. The transcript of T. R.'s testimony at the preliminary hearing is replete with her statements

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describing how her assailant held against her neck a "sharp metal object" throughout the course of the attack. She also asked her assailant to get out of her vehicle.

The resistance which must be exerted by a rape victim depends on the "age, strength, surrounding facts, and all attending circumstances [that] make it reasonable for her to do in order to manifest her opposition." (Citations omitted.) Haury v. State, 533 P.2d 991, 995 (Okl. Cr. 1975).

We think that T. R.'s conduct manifested the opposition which reasonably could be expected under the circumstances. Though she was not able to observe the object the assailant put to her neck, she could feel its sharpness and described markings left on her neck by its placement against the skin. Being weaponless, it's unlikely that she

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could have overpowered her assailant, and could not be expected to do so.

As his third assignment of error, appellant claims the trial court should have sustained his demurrer to the evidence which he lodged at the close of the State's evidence. His primary contention in this regard is that T. R.'s testimony was so inconsistent, improbable, incredible, contradictory, and thoroughly impeached that it was unworthy of belief and insufficient to support a conviction. Appellant points out a number of areas in T. R.'s testimony that appear to be contradictory, which, if read in context and compared with the questions asked, do not amount to real and substantial discrepancies.

We held in Gamble v. State, 576 P.2d 1184, 1185-86 (Okl. Cr. 1978) that:



to authorize reversal of a conviction for rape on the grounds that the evidence is too inherently improbable to support a conviction, the improbability of the prosecutrix' testimony must arise from something other than just the question of her believability. The testimony must be of such contradictory and unsatisfactory nature, or the witness must be so thoroughly impeached, that the reviewing court must say that such testimony is clearly unworthy of belief and insufficient as a matter of law to sustain a conviction.

In the instant case the prosecutrix' testimony remained relatively consistent from the time she just reported the incident to police officers the evening of the attack, until cross-examined at trial. She added some details at trial which she had previously failed to relate, and even hedged in details about which she previously had been more certain. But basically, her description of the attack and the attacker remained consistent. She never identified anyone

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other than appellant as her assailant, and never failed to identify him as the culprit. Also, her testimony was corroborated somewhat by the testimony of Mary Askew who also saw a person she identified as appellant in the parking lot where T. R. was abducted from shortly before the crimes occurred. Appellant's assignment wholly fails.

Next, appellant urges that reversal is required because an exhibit went to the jury which contained prejudicial matter and which had not been introduced at trial. The document was a police report compiled by the investigating officer. It mentioned that appellant was in custody as a suspect on another rape charge when T. R. identified him by photograph and by live lineup as her assailant. While the report was marked as "Defendant's Exhibit 18," it was never introduced by



defense counsel. It was used several times by defense counsel throughout the course of the trial, and eventually was taken by the bailiff to the jury during deliberations along with 80 pieces of evidence.

This error was raised in appellant's motion for new trial, and a hearing was held at which several jurors testified. The foreman testified that he was 99% certain that the jury did not discuss this report until a vote of guilty was made on each count. Another juror testified that he was certain of this fact.

Title 22 O.S. 1981, § 952 provides in part:

A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a defendant by which his substantial rights have been prejudiced, upon his application in the following cases only:



Second. When the jury have received any evidence out of court, other than that resulting from a view of the premises.

Appellant asserts that the statute dictates automatic reversal when it is violated. Further, he contends that it is the prosecutor's duty to police documents going to the jury so that it does not receive such evidence, citing Waide v. State, 13 Okl. Cr. 165, 162 P. 1139 (1917). We held in Edwards v. State, 637 P.2d 886 (Okl. Cr. 1981), that reversal is not required unless there is a reasonable possibility the prejudice could have resulted from the jury's examination of the evidence. In that case we found that it had not because the information in the documents wrongfully submitted to the jury had been fully explored at trial. Id. at 887. In the instant case we have the



testimony of two jurors who testified that the report was not considered prior to determinations of guilt on the charges. The trial judge considered this testimony and granted appellant a new trial as to punishment. A second jury then assessed punishment of fifty (50 years' imprisonment on each charge, as opposed to ninety-nine (99) years' imprisonment on each count as recommended by the first jury. Thus, any possible harm was rectified by the trial court. Furthermore, defense counsel is not absolved of all responsibility for what evidence reaches a jury, see Henderson v. State, 490 P.2d 786 (Okl. Cr. 1971), and the prosecutor does not bear sole responsibility, see Thomas v. State, 13 Okl. Cr. 418, 164 P. 995 (1917).

Appellant asserts that the trial court erred in failing to grant



his motion for new trial on the ground of newly discovered evidence. 22 O.S. 1981, § 952(7). He offered by affidavit evidence that a certain witness could testify that she met appellant for the first time the day after the crime occurred and that appellant had a full beard at that time. T. R. testified that her assailant only wore a mustache. Appellant claims that his girlfriend recalled their acquaintance with the potential witness only after the trial ended. He also claims that this witness' testimony is different from that of his seven other witnesses who testified at trial that he had a beard on the day of T. R.'s assault because this witness had never seen him before October 10, 1981, and never saw him afterwards. He argues that this witness would have a clear memory of his appearance on that date. However we think the

Appendix C  
Page 16 of 25

As appellant's final assignment of error, he asserts the trial court improperly restricted him in presenting the testimony of his witness. A new trial on sentencing alone had been allowed by the trial judge because evidence which had not been introduced went to the jury during deliberations and may have prejudiced appellant. The trial judge did not allow the testimony of appellant's witnesses as it became apparent on his offer of proof that the evidence was relevant to the issue of guilt.

The trial judge properly limited evidence to the issue of sentencing. We reasoned in Nipps v. State, 626 P.2d 1349 (Okla. Cr. 1981), a trial court properly limits voir dire questions and challenges to the jury to the issue of punishment. We held that there was no need to repeat the entire



evidence would be merely cumulative and would not change the result at trial. Smith v. State, 590 P.2d 687 (Okl. Cr. 1979). We do not find an abuse of the trial court's discretion which would justify reversal. Thompson v. State, 541 P.2d 1328 (Okl. Cr. 1975).

As appellant's sixth assignment of error it is noted that the trial court allowed the State to call a witness on rebuttal who had not been endorsed prior to trial. Appellant's motion to require the State to endorse all witnesses to be used at trial had been sustained prior to his trial by a district judge other than the trial judge. The statute which requires such endorsement is 22 O.S. 1981, § 303.

The witness in question is Mary Askew, a police officer who had investigated a vehicular accident in the parking lot from which T. R. was abducted.

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ed. She had returned to the parking lot about 8:00 p.m. on October 9, 1981, to complete her accident report. She testified that when she entered the parking lot that evening she was hailed by a man she identified as appellant who was standing in front of a club in the same lot. She was called at trial as a rebuttal witness for the State, stating that the appellant matched the description given by T. R. and that appellant was clean shaven except for a mustache.

This Court has long held that rebuttal witnesses need not be endorsed.

Martin v. State, 596 P.2d 899 (Okl. Cr. 1979); Boydston v. State, 79 Okl. Cr. 172, 152 P.2d 701 (1944). The State's failure to endorse this witness did not violate 22 O.S. 1981, § 303 though this witness' testimony could have been given in the State's case in chief. Mills v. State, 594 P.2d 374 (Okl. Cr. 1979). We



do not think the district judge who sustained appellant's motion was ordering disclosure of witnesses not required by law, and we therefore find this assignment is meritless.

Next, appellant urges that the information is deficient in stating facts to show that the offense of oral sodomy occurred. The language used is:

On or about the 9th day of October, 1981, A.D., the crime of oral sodomy was feloniously committed in Oklahoma County, Oklahoma, by Thomas Leroy Johnston who willful, unlawfully and feloniously committed the detestable and abominable crime against nature with one T. R., by having unnatural and carnal copulation by mouth with T. R.; contrary to the provisions of Section 886 of Title 21 of the Oklahoma Statutes.

We have previously held that an information "charging the commission of the crime against nature, in the language of the statute, with a person named, is



sufficient." Johnson v. State, 380 P.2d 284, 291-92 (Okl. Cr. 1963). We hold that the information adequately notified appellant of the charge; "it is unnecessary to go into the loathsome and disgusting details thereof." Berryman v. State, 283 P.2d 558, 562 (Okl. Cr. 1955), quoting State v. Whitmarsh, 26 S.D. 426, 128 N.W. 580, 581 (1910).

Appellant assigns as error the trial court's refusal to give the jury his requested cautionary instruction regarding identification. We find no error because none of the conditions existed which we have previously held to make such an instruction appropriate. We noted in Williams v. State, 648 P.2d 843, 844 (Okl. Cr. 1982), quoting Richardson v. State, 600 P.2d 361, 367 (Okl. Cr. 1979), that a "cautionary instruction should be given where the eyewitness lacked opportunity to observe



the assailant, or where the witness was not positive in his identification, or where the identification was weakened by either qualification or by a failure to identify the defendant on a prior occasion." None of these conditions prevailed in the instant case, though appellant did present substantial testimony contradicting the victim's identification of her assailant. Identity played a considerable role in appellant's defense, but this alone does not warrant a cautionary instruction.

The trial court did not specifically instruct the jury that penetration was required for the crime of rape to occur. 21 O.S. 1981, § 1113. The appellant assigns this as error. A reading of the instructions given shows that the jury was advised that rape is an act of sexual intercourse, tracing the applicable language of 21 O.S.



1981, § 1111. The victim testified that her assailant "put his penis into my vagina."

Penetration was proven by ample uncontradicted evidence. In Gautt v. State, 551 P.2d 1150 (Okl. Cr. 1976), we held it was error, but only harmless error, that the trial court failed to instruct that an accomplice's testimony must be corroborated because the evidence sufficiently proved this fact. Likewise, we find no error in the trial court's failure to instruct the jury regarding penetration. The evidence of penetration was clear. Also, the court defined rape as including sexual intercourse, a term commonly understood. Thus, its explicit definition was not an absolute necessity. See Darnell v. State, 369 P.2d 470 (Okl. Cr. 1962).

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trial. This principle applies equally to the punishment stage evidence. It should be limited to the issue of punishment.

Finding no error requiring reversal or modification, the judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT  
OF OKLAHOMA COUNTY, OKLAHOMA THE  
HONORABLE JOHN M. AMICK, DISTRICT JUDGE

THOMAS LEROY JOHNSTON, appellant, was convicted in the District Court of Oklahoma County in CRF-81-5088 of the offenses of Rape in the First Degree, Oral Sodomy and Kidnapping for the Purpose of Extorting Sexual Gratification. He received sentences of 99 years' imprisonment on each count. A new trial was granted on sentencing, and punishment was imposed of fifty (50) years' imprisonment on each count, to run concurrently from which he appeals.  
AFFIRMED.

HARRY A. WOODS, JR.  
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OKLAHOMA CITY, OKLAHOMA  
Attorneys for Appellee

OPINION BY CORNISH, J.,  
BUSSEY, J., CONCURS  
BRETT, J., CONCURS IN RESULTS

HAW07987



IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

THOMAS LEROY JOHNSTON, )  
Petitioner, )  
vs. ) CIV-85-2130-R  
JOHN MAKOWSKI and the )  
Attorney General of the )  
State of Oklahoma, )  
Respondents. )

JUDGMENT

In consideration of the  
Opinion entered this date,

IT IS HEREBY ORDERED, ADJUDGED  
AND DECREED that Petitioner's applica-  
tion for a Writ of Habeas Corpus is  
hereby denied and the Petition for Writ  
of Habeas Corpus is dismissed with  
prejudice.



Dated this 14th day of April,  
1986.

DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 4/14/86

HAW07887

DEC 23 1987

JOSEPH F. SPANIOLO, JR.

CLERK

No. 87-675

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

THOMAS LEROY JOHNSTON,  
Petitioner,

vs.

JOHN MAKOWSKI, Warden of  
Connors Correctional Center,  
and ROBERT H. HENRY,  
Attorney General of Oklahoma

Respondents.

RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE  
TENTH CIRCUIT

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## PROPOSITION II

THE COURT OF APPEALS WAS CORRECT IN ITS DETERMINATION TO GIVE TO THE STATE TRIAL COURT'S FINDING A PRESUMPTION OF CORRECTNESS AND WAS FURTHER CORRECT THAT THE UNADMITTED POLICE REPORT WAS NOT CONSIDERED BY THE STATE COURT JURY DURING THE DETERMINATION OF THE GUILT PHASE OF JURY DELIBERATIONS. . . . .

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### PROPOSITION III

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY DETERMINED THAT THE IN-COURT IDENTIFICATION BY THE VICTIM OF THIS PETITIONER WAS RELIABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST AS PROMULGATED BY THIS COURT. . .

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I.

QUESTIONS PRESENTED

1. Whether Petitioner's failure to raise any special or important reason compelling the exercise of this Court's discretion should result in the denial of his Petition for a Writ of Certiorari?

2. Whether Petitioner in the Courts below or in his Petition for a Writ of Certiorari has presented any persuasive argument that would indicate that the lower federal courts incorrectly afforded a presumption of correctness to the State trial court's findings of fact in regard to the presence in the jury room of an unadmitted defense exhibit?

3. Whether the lower federal court properly determined under the totality of the circumstances that the identification of the Petitioner here was



reliable, even assuming that a prior photographic identification procedure was impermissibly suggestive?

## II.

### STATEMENT OF THE CASE

#### A. Procedural Background.

The Respondents generally agree with the procedural background contained in Petitioner's Petition for Writ of Certiorari which was earlier submitted to this Court.

#### B. Factual Background.

##### 1. Police Report Not Admitted In Evidence in Jury Room.

All of the courts that have previously reviewed this issue at both the state and federal levels have been in agreement that the presence in the jury room of the police report that was not



formally admitted into evidence was not considered by the jury in reaching their finding of guilt on the charges upon which this Petitioner stands convicted.

In pertinent part, the United States Court of Appeals for the Tenth Circuit said in regard to this issue the following:

Appellant filed a motion in the State trial court for a new trial and for a hearing concerning the presence of the police report in the jury room. On March 24, 1982, the Court held an evidentiary hearing on the Motion. The Court heard testimony from the court reporter, the bailiff, the jury foreman--Robert P. Valleroy--and another juror--William G. Cochran. Valleroy testified that he was absolutely certain that the police report had not been discussed until after the verdict on the rape count had been reached. He stated that the report therefore had no bearing whatever on the rape conviction. He testified further that he was 99% certain that the report had no bearing on the verdict as to the sodomy and kidnapping counts. Cochran testified that no mention of the report was made in the jury



room until that part of the deliberations concerning sentencing.

At the conclusion of the hearing, the trial judge found that the jury had received the exhibit improperly but had not considered it until the sentencing part of the deliberations. The Court therefore granted Appellant's Motion for New Trial as to sentencing only. After a new trial as to sentencing the new jury fixed Appellant's sentence at fifty (50) years on each count, to run concurrently. (emphasis added).

Johnston v. Makowski, 823 F.2d 387, 389-390 (10th Cir. 1987).

The United States Court of Appeals for the Tenth Circuit, which utilized a more stringent standard even than the Oklahoma Court of Criminal Appeals ~~on~~ this issue, found under any standard that this Petitioner's claim had no merit. The Tenth Circuit held as follows on this issue:



The State trial court found that the police report was not used until the sentencing part of the jury deliberations. Absent the applicability of one of the exceptions listed in 28 U.S.C. §2254(d) (1982), that finding of fact must be accorded the presumption of correctness. Kuhlmann v. Wilson, 106 S.Ct. 2616, 2630 (1986); Sumner v. Mata, 449 U.S. 539, 547 (1981). Appellant has advanced no persuasive argument that any of those exceptions apply. We therefore accept the correctness of the State trial court's finding that the jury did not consider the police report during the determination of guilt phase of the jury deliberations. Any conceivable prejudice was cured by the new trial as to sentencing. It is clear that Appellant's claim fails even under the stringent standard of [United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973)]. (emphasis added)

Id. 823 F.2d at 390-391.

The Tenth Circuit, thus, correctly determined that a presumption of correctness was to be accorded to the State trial court's factual findings in regard to the police report at issue in



this case and that this Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were not violated by the presence of the police report in the jury room during deliberations.

2. Prior Tainted Identification.

Even though the United States Court of Appeals for the Tenth Circuit found that one of two photo lineups was impermissibly suggestive in this case because Petitioner's picture was newly taken, whereas the other pictures in the array were older, that Court determined under the proper test that under the totality of the circumstances, the identification of this Petitioner by his victim was clearly reliable. Id. Thus, the Tenth Circuit utilizing the test



promulgated by this Court in such cases as Simmons v. United States, 390 U.S. 377, 384 (1968) and Manson v. Brathwaite, 432 U.S. 98, 114 (1977), said the following:

Appellant spoke with [the victim] for approximately ten minutes before abducting her. In total, Appellant was in her view for 45 minutes. She testified that, although the parking lot was not lit, she could see his face because of the moonlight and the overhead light in her car. She gave a description of him immediately after the crimes had been committed. That description was very close to Appellant's actual appearance. [The victim] described his unique shoes and supplied the police with a newspaper advertisement depicting a similar pair.

Moreover, the State appellate court had before it the composite drawing made on the night of the rape and commented on its likeness to appellant. The Court also had the photo array and lineup pictures. Based on a review of them, the court declined to find such improper suggestiveness as to exclude the subsequent in-court identification. The ultimate



conclusion of that court is supported fully by the record.

We hold that, although the photographic identification was impermissibly suggestive, under the totality of the circumstances Appellant's due process rights were not violated.

Id.

The Oklahoma Court of Criminal Appeals in affirming this Petitioner's conviction, essentially utilized the same test as that of the Tenth Circuit when it relied upon the factors enunciated by this Court in United States v. Wade, 388 U.S. 218 (1967). See, Johnston v. State, 673 P.2d 844 (Okl.Cr. 1983). The Oklahoma Court of Criminal Appeals further noted that the victim "never waivered in her identification of Appellant as her assailant." Id. at 847. Thus, all of the courts to this date that have reviewed the identification



procedure have determined that Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution were not violated by those procedures. All courts have further determined that the identification of this Petitioner as the assailant under the totality of the circumstances was clearly reliable under the standards, factors and tests as promulgated by this Court.

#### PROPOSITION I

PETITIONER'S FAILURE TO RAISE ANY SPECIAL OR IMPORTANT REASON COMPELLING THE EXERCISE OF THIS COURT'S DISCRETION SHOULD RESULT IN THE DENIAL OF HIS PETITION FOR CERTIORARI.

Although the Petitioner has identified sections of the United States Constitution which he claims are involved with his request for relief in this case,



review of the arguments raised by Petitioner revealed that he has absolutely failed to implicate in any way that his constitutional rights under the Fifth, Sixth or Fourteenth Amendments to the United States Constitution were violated in regard to his State court convictions. At best, Petitioner is merely seeking yet another appellate review of issues which have been thoroughly and exhaustively determined not to present constitutional implications in regard to those convictions. Simply put, this is not a request which justifies the exercise of this Court's jurisdiction under a Writ of Certiorari.

The purpose of the extraordinary remedy of Certiorari is to offer a limited review of a cause which has been



determined by a lower court. It should only be granted when the case under review presents a case of unfair justice, entitled to redress, but the ordinary forms of proceedings are not capable of providing relief.

This Court has limited access by way of Certiorari, recognizing that only fundamental questions of widespread importance should be considered:

[I]t is very important that we be consistent in not granting the Writ of Certiorari in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

The Supreme Court rules further delineate the narrow limits of this seldom granted request:



[Certiorari is] not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

Supreme Court Rule 19 (1).

In regard to the first issue raised by the Petitioner before this Court, he attempts to assert that there is a conflict between the United States Court of Appeals decision in this case and that of the United States Court of Appeals for the Fifth Circuit in the case of U.S. v. Shafer, 455 F.2d 1167 (5th Cir. 1972), because in Shafer, the Fifth Circuit held that a Defendant was not required to prove that an unadmitted exhibit was actually considered by the jury and that it could not be assumed that the jury did not see said exhibit. The Petitioner, however, misperceives the holding in this case as requiring a



criminal defendant to be held to such a burden of proof. This case, of course, was litigated in the federal courts as a Petition for Writ of Habeas Corpus challenging a state court conviction. It was not a case originally brought as a federal criminal case against a federal defendant and no issue in the federal courts either expressly or implicitly decided any issue in regard to burden of proof. The main issue in the federal courts in regard to the unadmitted exhibit was whether those courts were required by the pronouncements of this Court to give a presumption of correctness to state court findings that the exhibit was not considered by the jury in the guilt or innocence phase of Petitioner's state court trial. The controlling factors in a direct appeal



from a federal conviction are wholly distinguishable when a federal court is asked via a Writ of Habeas Corpus to overturn or interfere with a state criminal conviction. In the federal criminal situation the various courts of appeal in this country, of course, have superintending control over lower federal courts and they may decide issues that they cannot when they are asked to grant a Writ of Habeas Corpus in regard to a state court conviction. The cases of this court, particularly Kuhlman and Sumner, *supra*, clearly indicate that when a federal court is asked to overturn a state court conviction on a basis that has already been litigated in the state courts and those courts have made factual findings that are adequately and fairly supported by the record in the state



court that a federal court must accept those findings and give them a presumption of correctness. Such a result, contrary to the position of the Petitioner, does not evidence a split among the federal courts of appeal in this nation, but merely indicates and evidences that a federal court in a Habeas action challenging the constitutionality of a state court conviction has a different and more limited role than it would have if it was simply reviewing a criminal conviction out of a lower federal court.

Furthermore, to this date, this Petitioner has wholly failed to submit any evidentiary support that the jury in his case either reviewed, saw or considered the unadmitted exhibit in their deliberations in the guilt or



innocence phase of his trial. He has never submitted an affidavit from any of the ten jurors who were not called as witnesses at the state trial court hearing on the Motion for New Trial, even though he could have done so in the federal district court. As the United States Court of Appeals found, this Petitioner has simply failed to present any persuasive argument that any of the exceptions listed under 28 U.S.C. §2254(d) apply here that would allow a federal court to ignore the State trial court's finding that the exhibit here was not viewed or utilized by the State jury in its deliberations in the guilt phase of his trial. This decision of the Tenth Circuit was correct and the issue as raised by the Petitioner simply does not call for this Court's grant of the



extraordinary relief of Certiorari.

The second issue raised by Petitioner here, also does not raise any special or important reason for this Court to grant the extraordinary Writ of Certiorari. The record in this case shows that the Oklahoma Court of Criminal Appeals, the federal district court and the United States Court of Appeals utilized the appropriate test on this issue as promulgated by this Court in Simmons, Manson, and U.S. v. Wade, supra. All of said courts based on the record at Petitioner's trial determined that the identification by the victim of this Petitioner was clearly reliable and that said identification was an unwavering one of this Petitioner as her assailant. It is also interesting to note that even as to this second issue



raised by Petitioner here, i.e. the claim that one of the photo arrays shown to the victim was impermissibly suggestive, that the federal district court properly gave to the factual findings of the Oklahoma Court of Criminal Appeals a presumption of correctness under Sumner, supra. Therefore, in regard to the second issue, there is simply no special or important reason that would require this Court to utilize the extraordinary grant of a Writ of Certiorari.



## PROPOSITION II

THE COURT OF APPEALS WAS CORRECT IN ITS DETERMINATION TO GIVE TO THE STATE TRIAL COURT'S FINDING A PRESUMPTION OF CORRECTNESS AND WAS FURTHER CORRECT THAT THE UNADMITTED POLICE REPORT WAS NOT CONSIDERED BY THE STATE COURT JURY DURING THE DETERMINATION OF THE GUILT PHASE OF JURY DELIBERATIONS.

Under 28 U.S.C. §2254(d), findings of fact by state courts are entitled to a presumption of correctness unless a Petitioner can satisfy a federal court that the presumption should be rebutted by one of eight statutory grounds. Section 2254(d) applies to cases in which a state court of competent jurisdiction has made a determination after a hearing on the merits of a factual issue. It makes no distinction or difference that the factual determinations were made by a state trial court or those of a state appellate



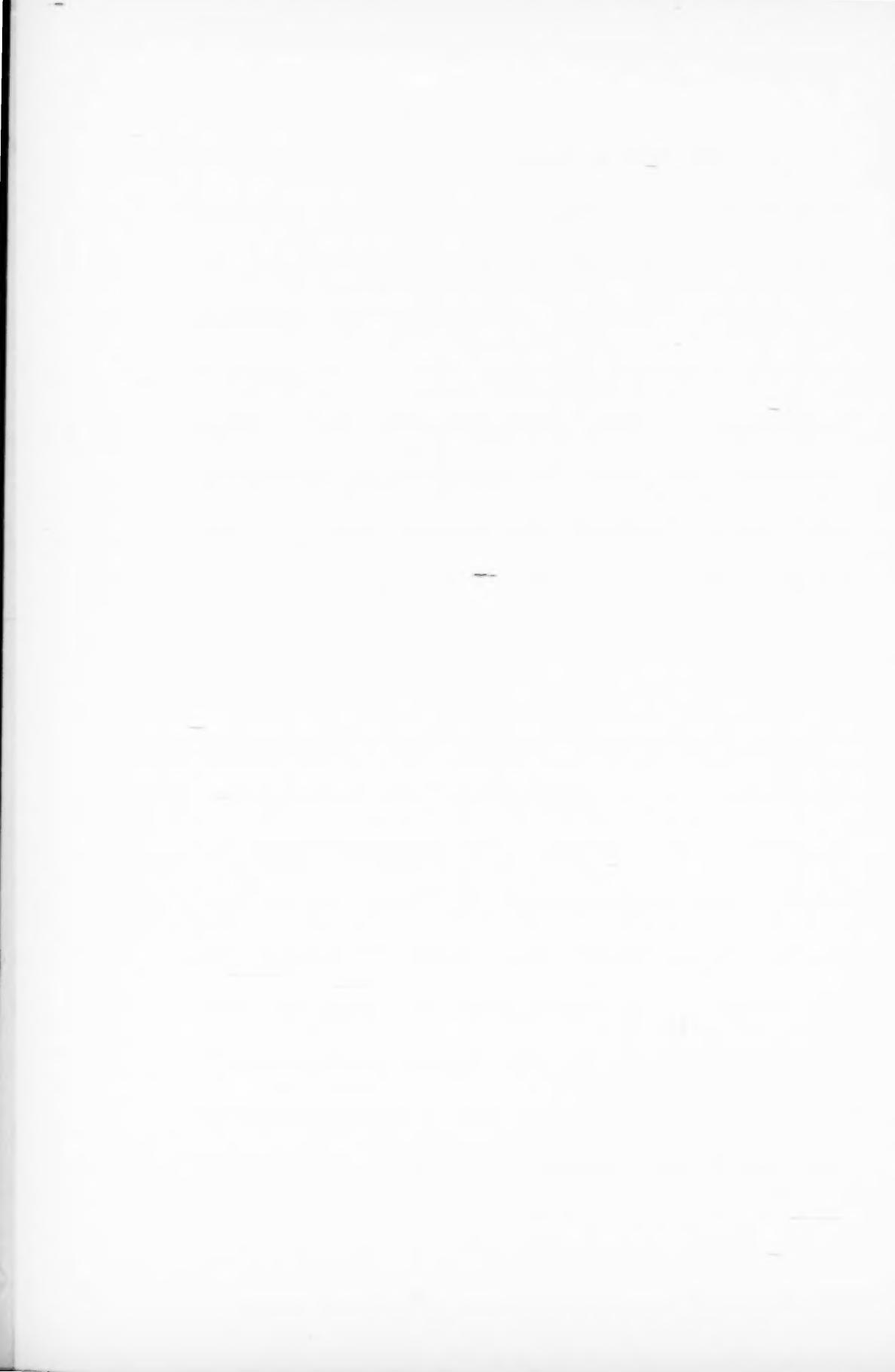
court. Sumner v. Mata, *supra*. As this Court noted in Sumner:

A writ issued at the behest of a Petitioner under 28 U.S.C. §2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgment of which the Petitioner stands convicted and friction is a likely result. The long line of our cases previously referred to accepted that friction as a necessary consequence of the Federal Habeas Act of 1867, 28 U.S.C. §2254. But it is clear that in adopting the 1966 amendment, Congress in §2254(d) intended not only to minimize that inevitable friction but also to establish that the findings made by the state court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in §2254(d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the habeas court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous". (emphasis in original)

Sumner v. Mata, *supra*, 449 U.S. at 550.



In the present case, as noted in Proposition I, supra, the lower federal courts made a determination that none of the eight factors specified in Section 2254(d) applied to this case. In such a situation, the Petitioner was thus required to show by convincing evidence that the factual determination by the state courts in regard to the unadmitted exhibit not having any prejudicial effect in the guilt phase of the trial and not being utilized by the jury in its deliberation in such phase was erroneous. Further, as noted in Proposition I, supra, the Petitioner to this date has failed to present any such evidence to any court. He continues to rely on the record reviewed by the Oklahoma Court of Criminal Appeals and the federal courts that have now denied him a Writ of Habeas



Corpus in regard to his state court convictions. Therefore, the lower federal courts were correct in giving a presumption of correctness to the state trial court's findings that the jury did not utilize the involved exhibit in its deliberations in the guilt phase of the trial.

Even under the standard utilized by the Court of Appeals in this case relying on United States v. Marx, *supra*, and applying the proper presumption of correctness to the state court findings, there is not the slightest possibility that harm could have resulted from the police reports' presence in the jury room. This Petitioner seems to want to rely on a *per se* rule that the mere presence of an unadmitted exhibit in the jury room requires reversal of a criminal



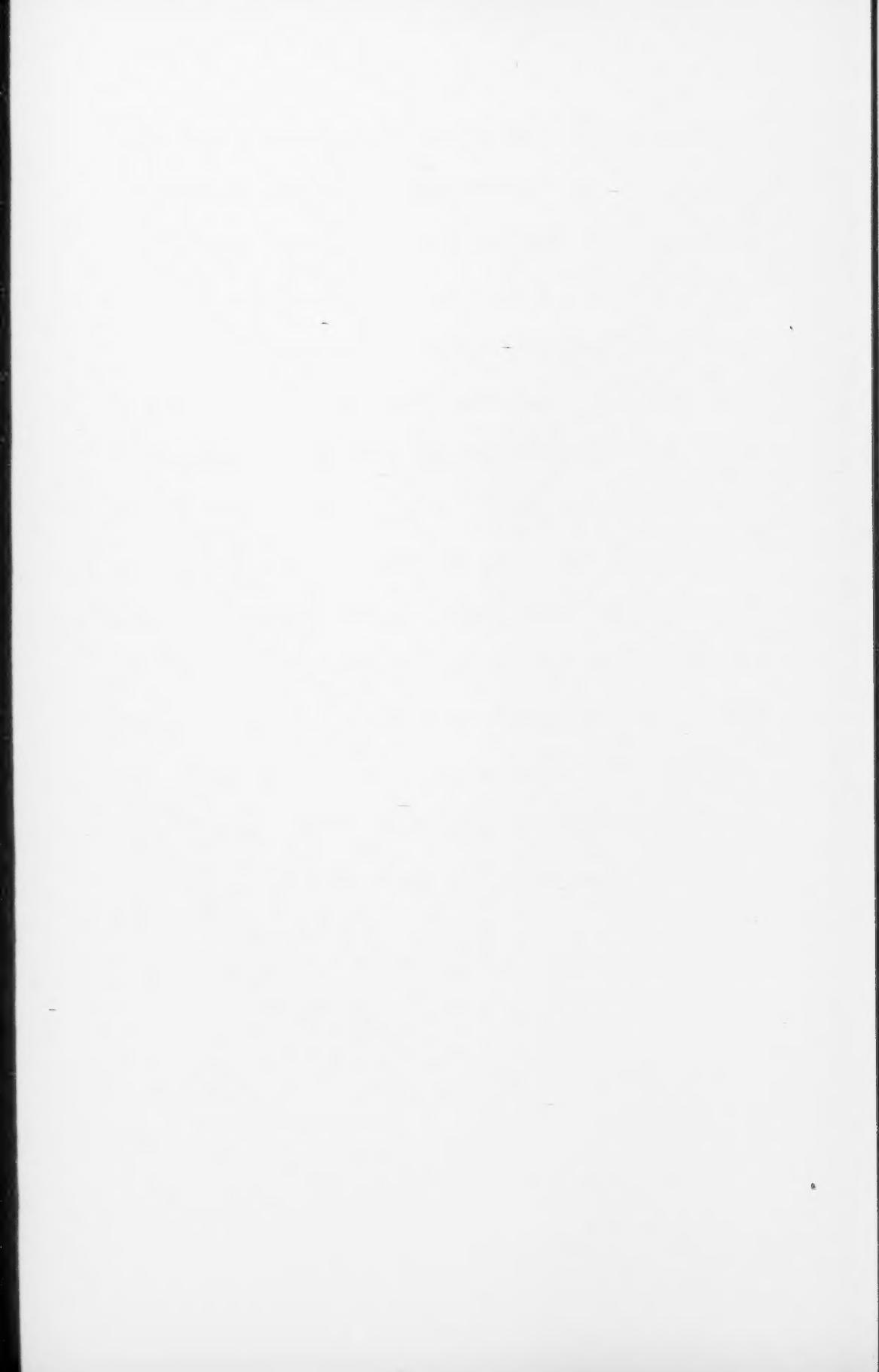
conviction. He cites no cases supporting such a rule. Further, the problem with such a rule, of course, in this situation is that there is simply no evidence and no indication that the police report was ever considered or viewed by this jury in the guilt phase of Petitioner's state court trial. Further, contrary to the assertion of the Petitioner that the record as a whole does not support this factual determination the record before the State courts and the federal courts clearly supports a factual finding that this exhibit was not so utilized by the state court jury. The jury foreman testified at the Motion for New Trial that the jurors did not pay attention to the unadmitted police report until after they had voted Johnston guilty. He further testified that he was positive



that the police report was not considered on the rape conviction and that he was 99% sure that it was not considered for the sodomy and kidnapping offenses. He further testified that the exhibit had no bearing on the guilty votes for these two latter offenses and that he was almost positive the unadmitted exhibit did not come up until after the votes were taken finding Johnston guilty. The other juror that testified, Juror Cochran, indicated that the jury had reached its verdict prior to discovering the unadmitted exhibit. However, Juror Cochran indicated that members of the jury did apparently see the exhibit prior to the sentencing phase of the trial. Of course, any taint during the sentencing phase of Petitioner's trial was cured by a new sentencing proceeding. Therefore,



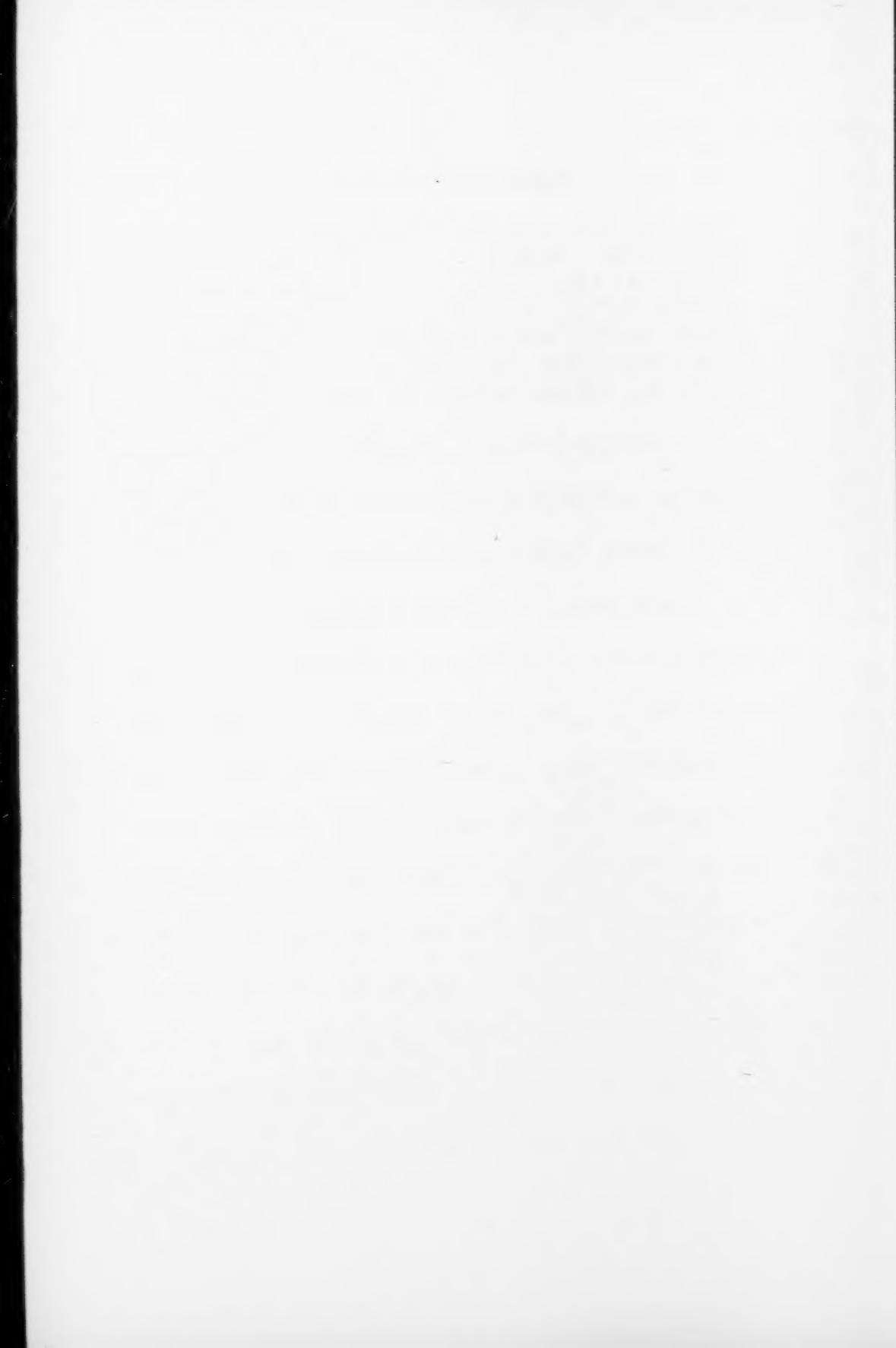
contrary to Petitioner's assertion that there is no evidence in the record to support the factual finding of the state trial court or that the record as a whole does not support such a factual finding, the record here is virtually conclusive that this jury during the guilt phase of the trial did not consider this unadmitted police report. In that the Petitioner has failed to overcome the presumption of correctness as found by the lower federal district court and the Court of Appeals, this Court is respectfully requested to deny his Petition for Writ of Certiorari.



### PROPOSITION III

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY DETERMINED THAT THE IN-COURT IDENTIFICATION BY THE VICTIM OF THIS PETITIONER WAS RELIABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST AS PROMULGATED BY THIS COURT.

Petitioner claims that the victim's identification of him at trial should have been suppressed because it was tainted by an impermissibly suggestive pretrial identification procedure. As the Court of Appeals determined, the identification of this Petitioner at trial had sufficient indicia of reliability to render it admissible. The victim talked face to face with the Petitioner for approximately 10 minutes just prior to the sexual assault. She was with the Petitioner for approximately 45 minutes.



- The description of the Petitioner given to the police shortly after the crime was a good description. The victim never identified anyone other than the Petitioner as her assailant; the victim never failed to identify the Petitioner as the assailant and the victim first identified this Petitioner as her assailant only two weeks after the crime. The Oklahoma Court of Criminal Appeals further made specific factual findings in regard to this claim of error of the Petitioner:

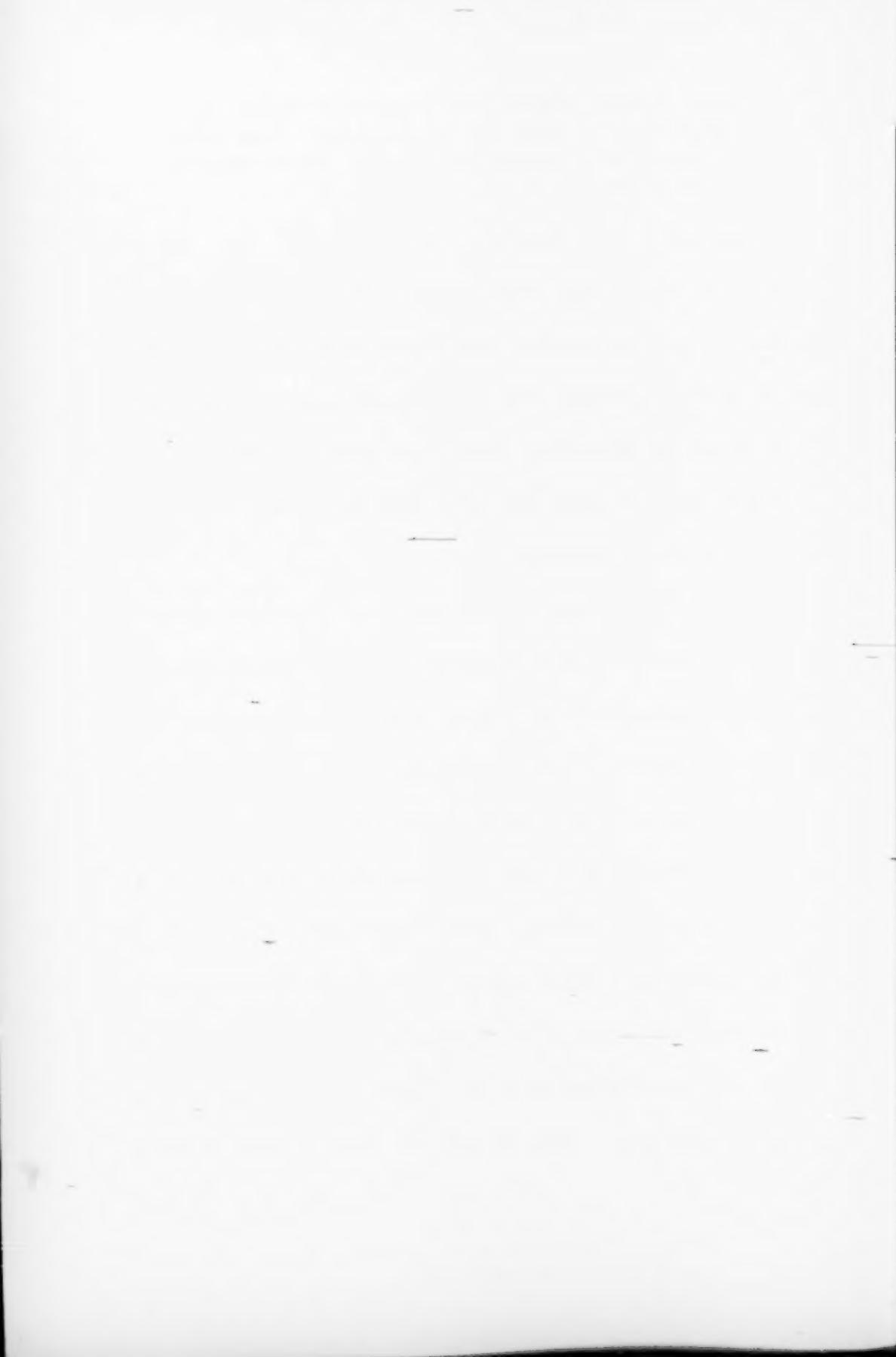
[The victim] never waived in her identification of Appellant as her assailant. The description she gave to police the night of the attack was a rather good description of Appellant, especially viewing the composite drawing made at the police station that night. The discrepancies were not that great. Neither were the differences between Appellant and the other men in the lineups and, although [the victim] was not abducted from a well-lighted area,



she spent about 45 minutes with him and was aided by moonlight and the vehicles' overhead light in viewing the assailant.

Johnson v. State, 673 P.2d at 847. These factual findings of the Oklahoma Court of Criminal Appeals are entitled to a presumption of correctness under 28 U.S.C. §2254(d), just as the findings of fact in regard to the unadmitted exhibit discussed earlier.

Further, the United States Court of Appeals for the Tenth Circuit utilized the appropriate test as promulgated by this Court in determining under the totality of the circumstances the identification of this Petitioner was clearly reliable, even though that Court determined that one of the two prior photographic identification procedures were impermissibly suggestive. Johnston v. Makowski, 823 F.2d at 391. The Tenth



Circuit further correctly utilized the factors set forth by this Court in the case of Manson v. Brathwaite, 432 U.S. 98, 114 (1977). There is simply no reason submitted by the Petitioner that would indicate that the identification in court of this Petitioner as the assailant violated his due process rights under the Fourteenth Amendment to the United States Constitution, as all courts that have now reviewed the issue have so determined. In such a situation, this court has been presented with no reason, other than Petitioner's seeking to gain another review of his conviction, to grant the extraordinary Writ of Certiorari in this case.



CONCLUSION

For all of the reasons specified above, this Court is requested to deny the Petition for Writ of Certiorari filed by this Petitioner.

Respectfully submitted,

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